

16A C.J.S. Constitutional Law II VII Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

[Topic Summary](#) | [Correlation Table](#)

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West's A.L.R. Digest, [Constitutional Law](#) 🔑 1096 to 1100, 2781 to 2793, 2800, 2802, 2812, 2815 to 2828, 2838 to 2845

West's A.L.R. Digest, [Statutes](#) 🔑 1552, 1553, 1558, 1559, 1562, 1563, 1578(2), 1585

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

[Topic Summary](#) | [Correlation Table](#)

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law

A.L.R. Index, Retroactive Laws

West's A.L.R. Digest, [Statutes](#)  [1552](#), [1553](#), [1558](#), [1559](#), [1562](#), [1578\(2\)](#), [1585](#)

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16A C.J.S. Constitutional Law § 645

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

1. In General

§ 645. Retroactive or retrospective laws and ex post facto laws; definitions and distinctions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1552

A retrospective or retroactive law is one that relates back to a previous transaction and gives it some different legal effect from that which it had under the law when it occurred. Such a law is often constitutionally objectionable as it impairs vested rights acquired under the former laws. Retroactive, retrospective, and ex post facto laws are constitutionally suspect for similar reasons although ex post facto usually refers specifically to criminal laws.

As commonly used, the terms retrospective and retroactive are synonymous and interchangeable,¹ and retrospective or retroactive laws are broadly defined as those laws having reference to a state of things existing before the statute in question was enacted or amended.² More precisely, these laws relate back to a previous transaction and gives it some different legal effect from that which it had under the law when it occurred.³ A retroactive law affects rights, obligations, acts, transactions, and conditions which are performed or exist prior to the adoption of the law,⁴ and such a law attaches new legal consequences to, or substantially changes the legal consequences of, past events.⁵ Thus, a statute, when applied so as to determine the legal significance of acts or events that occurred prior to its effective date, is said to apply retroactively.⁶

While in their general sense retroactive and retrospective laws include ex post facto laws,⁷ technically, there is a distinction,⁸ the former terms being applied only to laws dealing with civil matters.⁹

In the sense in which it is constitutionally objectionable,¹⁰ a retroactive or retrospective law is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past,¹¹ and various of these elements have been combined in similar definitions.¹²

A statute is not retroactive or retrospective merely because it relates to antecedent events¹³ without changing their legal effect or because part of the requisites of its action is drawn from time antecedent to its passing.¹⁴ A statute that takes effect immediately is not retrospective in its operation.¹⁵ Also, a law may permissibly change the future consequences of an act, and even the consequences of acts committed prior to the law's enactment, without operating retroactively.¹⁶ Further, a statute is not retrospective where it regulates the future use of existing property,¹⁷ particularly where such regulation is a proper exercise of police powers,¹⁸ involves the public interest,¹⁹ or operates solely on future transactions.²⁰ Laws do not have an impermissible retroactive effect unless they prejudice a right of a third person already acquired.²¹

A statute does not operate retrospectively merely because it upsets expectations based in prior law.²² However, elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly, and settled expectations should not be lightly disrupted.²³ Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past.²⁴

When a law is declaratory in form as well as retroactive, it will be upheld ordinarily in those cases where retroactive legislation is permissible.²⁵ Thus, a statute is not constitutionally objectionable as retroactive where it is merely a codification²⁶ or statutory declaration²⁷ of an existing rule. Similarly, where the legislature acts to clarify existing law,²⁸ as by construing an ambiguity in a preexisting statute,²⁹ or even where it defines the retroactive scope of an overruling court decision,³⁰ it is not legislating retroactively.

Moreover, a declaratory statute which is to operate only on future cases is not constitutionally objectionable because it changes the existing law³¹ or because it assumes the law to have been in the past what the statute declares that it shall be in the future.³² The legislature cannot, however, revise the operation of an existing law by enacting an amendatory or declaratory statute to affect past transactions³³ or declare the construction of a previous statute so as prejudicially to affect constitutional and vested rights.³⁴ Furthermore, having achieved finality, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and the legislative branch may not declare by retroactive legislation that the law applicable to that very case was something other than what the court said it was.³⁵

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Footnotes

- 1 Minn.—*State v. Industrial Tool & Die Works*, 220 Minn. 591, 21 N.W.2d 31 (1945).
- 2 Vt.—*Pabst v. Commissioner of Taxes*, 136 Vt. 126, 388 A.2d 1181 (1978).
- 3 Cal.—*Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 62 Cal. Rptr. 2d 243, 933 P.2d 507, 32 U.C.C. Rep. Serv. 2d 534 (1997).
Mont.—*Porter v. Galarneau*, 275 Mont. 174, 911 P.2d 1143 (1996).

"Different legal effect" construed

For purposes of retroactivity analysis, a statute creates a "different legal effect" if it would impair rights a party had when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Alaska—[Rush v. State, Dept. of Natural Resources](#), 98 P.3d 551 (Alaska 2004).

Colo.—[In re Estate of DeWitt](#), 54 P.3d 849 (Colo. 2002).

Ohio—[Bielat v. Bielat](#), 87 Ohio St. 3d 350, 2000-Ohio-451, 721 N.E.2d 28 (2000).

U.S.—[Landgraf v. USI Film Products](#), 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); [Miller v. LaSalle Bank Nat. Ass'n](#), 595 F.3d 782 (7th Cir. 2010) (under Indiana law).

Cal.—[McClung v. Employment Development Dept.](#), 34 Cal. 4th 467, 20 Cal. Rptr. 3d 428, 99 P.3d 1015 (2004).

Common sense, functional judgment

(1) The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.

Conn.—[State v. Faraday](#), 268 Conn. 174, 842 A.2d 567 (2004).

Utah—[Goebel v. Salt Lake City Southern R. Co.](#), 2004 UT 80, 104 P.3d 1185 (Utah 2004).

(2) Such judgment should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

Utah—[Goebel v. Salt Lake City Southern R. Co.](#), 2004 UT 80, 104 P.3d 1185 (Utah 2004).

Me.—[Dobson v. Quinn Freight Lines, Inc.](#), 415 A.2d 814 (Me. 1980).

U.S.—[Calder v. Bull](#), 3 U.S. 386, 3 Dall. 386, 1 L. Ed. 648, 1798 WL 587 (1798).

Utah—[State ex rel. Stain v. Christensen](#), 84 Utah 185, 35 P.2d 775 (1934).

As to ex post facto laws, generally, see §§ 671 to 695.

N.C.—[Bateman v. Sterrett](#), 201 N.C. 59, 159 S.E. 14 (1931).

Mo.—[Westerman v. Supreme Lodge, K.P.](#), 196 Mo. 670, 94 S.W. 470 (1906).

As to application of ex post facto laws to civil rights or remedies, see § 675.

Ill.—[People v. Thiem](#), 82 Ill. App. 3d 956, 38 Ill. Dec. 416, 403 N.E.2d 647 (1st Dist. 1980).

Ohio—[State v. Walls](#), 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829 (2002).

Colo.—[Daimler Chrysler Financial Services Americas, LLC v. Colorado Department of Revenue](#), 2014 COA 24, 2014 WL 974974 (Colo. App. 2014), cert. denied, 2014 WL 6884043 (Colo. 2014).

Conn.—[Commissioner of Public Health v. Freedom of Information Com'n](#), 311 Conn. 262, 86 A.3d 1044 (2014).

Mich.—[LaFontaine Saline, Inc. v. Chrysler Group, LLC](#), 496 Mich. 26, 852 N.W.2d 78 (2014).

Ohio—[State v. Reed](#), 2014-Ohio-5463, 25 N.E.3d 480 (Ohio Ct. App. 11th Dist. Lake County 2014).

Laws affecting rights, generally, see §§ 650 to 653.

Test

The test as to whether a law is or is not retroactive is whether a vested right is impaired or defeated.

Wis.—[In re Paternity of John R.B.](#), 2005 WI 6, 277 Wis. 2d 378, 690 N.W.2d 849 (2005).

Expansion of liability

A new statutory provision imposing broader duties on a defendant than existed under the common law expands the defendant's liability and consequently constitutes retroactive application of the statute.

Cal.—[Elsner v. Uveges](#), 34 Cal. 4th 915, 22 Cal. Rptr. 3d 530, 102 P.3d 915 (2004).

Cal.—[Myers v. Philip Morris Companies, Inc.](#), 28 Cal. 4th 828, 123 Cal. Rptr. 2d 40, 50 P.3d 751 (2002).

Wash.—[State v. Humphrey](#), 139 Wash. 2d 53, 983 P.2d 1118 (1999).

U.S.—[Regions Hosp. v. Shalala](#), 522 U.S. 448, 118 S. Ct. 909, 139 L. Ed. 2d 895, 123 Ed. Law Rep. 1038 (1998).

Colo.—[In re Estate of DeWitt](#), 54 P.3d 849 (Colo. 2002).

Mich.—[Davis v. State Employees' Retirement Bd.](#), 272 Mich. App. 151, 725 N.W.2d 56 (2006).

N.D.—[Lehman v. State](#), 2014 ND 103, 847 N.W.2d 119 (N.D. 2014).

Wash.—[State v. Varga](#), 151 Wash. 2d 179, 86 P.3d 139 (2004).

Assessments upon insurance companies

The mere fact that assessments authorized against insurance companies under an act for the purpose of paying claims of policyholders of a company which had been ordered into liquidation were based upon

premiums received prior to the effective date of the act did not render the act unconstitutionally retroactive in application.

Wash.—*Aetna Life Ins. Co. v. Washington Life and Disability Ins. Guaranty Ass'n*, 83 Wash. 2d 523, 520 P.2d 162 (1974).

14 Colo.—*Continental Title Co. v. District Court In and For City and County of Denver*, 645 P.2d 1310 (Colo. 1982).

Wash.—*State v. Blank*, 131 Wash. 2d 230, 930 P.2d 1213 (1997).

Elements of crime

Although the defendant was convicted of burglary before the enactment of a statute providing that carrying a concealed weapon by a previously convicted felon is to be considered a felony, the defendant charged with carrying a concealed weapon was not entitled to the protection afforded by the constitutional guaranty against the enactment of retroactive laws inasmuch as the legislation did not alter the elements of the crime of carrying a concealed weapon.

Ohio—*State v. Wiles*, 20 Ohio Misc. 279, 49 Ohio Op. 2d 183, 49 Ohio Op. 2d 495, 250 N.E.2d 628 (C.P. 1969).

15 N.Y.—*English v. Lefever*, 110 Misc. 2d 220, 442 N.Y.S.2d 385 (Sup 1981).

Language not supportive of retroactive application

N.Y.—*State ex rel. Spitzer v. Daicel Chemical Industries, Ltd.*, 42 A.D.3d 301, 840 N.Y.S.2d 8 (1st Dep't 2007).

16 La.—*Walls v. American Optical Corp.*, 740 So. 2d 1262 (La. 1999).

17 Ga.—*Delaney v. Plunkett*, 146 Ga. 547, 91 S.E. 561 (1917).

Existing tenement buildings

Wis.—*Nelson v. State*, 167 Wis. 515, 167 N.W. 807 (1918).

18 Or.—*Daniels v. City of Portland*, 124 Or. 677, 265 P. 790, 59 A.L.R. 512 (1928).

Inspection of investigative records

In applying a statute, effective in a particular year, making investigative records of the attorney general confidential, barring an attempted inspection in a later year of records of the attorney general relating to an investigation antedating the statute does not constitute giving such statute retrospective effect.

Me.—*Dunn & Theobald, Inc. v. Cohen*, 402 A.2d 603 (Me. 1979).

20 Ga.—*Thompson v. Hornsby*, 235 Ga. 561, 221 S.E.2d 192 (1975).

N.H.—*Sexton Motors, Inc. v. Renault Northeast, Inc.*, 121 N.H. 460, 431 A.2d 116 (1981).

Further performance of prior contracts

U.S.—*U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007 (1897).

Effect on executed will

Wis.—*Matter of Eisenberg's Estate*, 90 Wis. 2d 620, 280 N.W.2d 359 (Ct. App. 1979).

Registration

A licensing law, including a grandfather clause provision requiring that those seeking registration without examination apply before a certain date, was not prohibited retroactive legislation.

Ohio—*Garono v. State Bd. of Landscape Architect Examiners*, 35 Ohio St. 2d 44, 64 Ohio Op. 2d 25, 298 N.E.2d 565 (1973).

21 Tex.—*American Sur. Co. of New York v. Axtell Co.*, 120 Tex. 166, 36 S.W.2d 715 (Comm'n App. 1931).

22 Cal.—*In re Marriage of Howell*, 195 Cal. App. 4th 1062, 126 Cal. Rptr. 3d 539 (4th Dist. 2011).

Ill.—*Hayashi v. Illinois Dept. of Financial and Professional Regulation*, 2014 IL 116023, 388 Ill. Dec. 878, 25 N.E.3d 570 (Ill. 2014).

Mass.—*Moe v. Sex Offender Registry Bd.*, 467 Mass. 598, 6 N.E.3d 530 (2014).

Nev.—*Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 129 Nev. Adv. Op. No. 87 (Nev. 2013).

Wash.—*In re Flint*, 174 Wash. 2d 539, 277 P.3d 657 (2012).

23 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

24 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

25 U.S.—*Graham v. Goodcell*, 282 U.S. 409, 51 S. Ct. 186, 75 L. Ed. 415 (1931).

26 N.Y.—*In re West's Estate*, 289 N.Y. 423, 46 N.E.2d 501, 149 A.L.R. 1365 (1943), judgment aff'd, 321 U.S. 36, 64 S. Ct. 384, 88 L. Ed. 526 (1944).

27 N.Y.—*In re Gato's Estate*, 276 A.D. 651, 97 N.Y.S.2d 171 (1st Dep't 1950), order aff'd, 301 N.Y. 653, 93 N.E.2d 924 (1950).

- 28 Cal.—[McClung v. Employment Development Dept.](#), 34 Cal. 4th 467, 20 Cal. Rptr. 3d 428, 99 P.3d 1015 (2004).
Reason for rule
The application of a statute that clarifies existing law is not retrospective because the true meaning of the statute has not changed.
- 29 Cal.—[In re S.B.](#), 32 Cal. 4th 1287, 13 Cal. Rptr. 3d 786, 90 P.3d 746 (2004).
Wash.—[Carpenter v. Butler](#), 32 Wash. 2d 371, 201 P.2d 704 (1949).
- 30 Cal.—[Schettler v. County of Santa Clara](#), 74 Cal. App. 3d 990, 141 Cal. Rptr. 731 (1st Dist. 1977).
31 U.S.—[Personal Finance Co. of Braddock v. U.S.](#), 86 F. Supp. 779 (D. Del. 1949).
32 U.S.—[Personal Finance Co. of Braddock v. U.S.](#), 86 F. Supp. 779 (D. Del. 1949).
33 Cal.—[People v. Cuevas](#), 111 Cal. App. 3d 189, 168 Cal. Rptr. 519 (4th Dist. 1980).
34 U.S.—[Personal Finance Co. of Braddock v. U.S.](#), 86 F. Supp. 779 (D. Del. 1949).
35 U.S.—[Plaut v. Spendthrift Farm, Inc.](#), 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).

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16A C.J.S. Constitutional Law § 646

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

1. In General

§ 646. Construction and interpretation; presumption against retroactivity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1552

In determining whether a statute should be applied retroactively, the first inquiry is whether there is evidence of a legislative intent to apply the statute retroactively. If a statutory provision would operate retroactively as applied to cases pending at the time the provision was enacted, then there is a presumption that it does not govern, absent a clear legislative intent favoring such a result.

In determining whether a statute should be applied retroactively, the first inquiry is whether there is evidence of a legislative intent to apply the statute retroactively.¹ In other words, in determining whether a statute has an impermissibly retroactive effect, a court first looks to whether the legislative body set forth the statute's intended reach.² Retroactivity is a matter on which judges tend to have significant experience, and the familiar considerations of fair notice, reasonable reliance, and settled expectations offer guidance in determining whether a statute operates retroactively.³ The constitutional impediments to retroactive civil legislation are usually modest, but prospectivity remains the appropriate default rule.⁴

A federal statute may not be applied retroactively absent a clear indication from Congress that it intended such a result.⁵ Thus, the first step in determining whether a federal statute has an impermissible retroactive effect is to ascertain whether Congress

has directed with the requisite clarity that the law be applied retrospectively.⁶ Requiring a clear intent that the statute applies retroactively assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.⁷

If no legislative intent to apply a statute retroactively is found, the analysis stops there, and the statute is deemed to be prospective only,⁸ but if the court concludes that the legislature did intend for the statute to have retroactive effect, the court must then examine whether such effect would contravene some constitutional right or prohibition.⁹ The U.S. Supreme Court has stated that in the absence of express language prescribing a statute's proper reach and where retroactive application of the law would have a disfavored consequence, the Court applies a presumption against retroactivity by construing the statute as inapplicable to the event or act in question.¹⁰

If a statutory provision would operate retroactively as applied to cases pending at the time the provision was enacted, then there is a presumption that it does not govern, absent a clear legislative intent favoring such a result.¹¹ A statute will not be given retroactive effect unless such construction is required by the statute's explicit language or by necessary implication.¹² Under the presumption against retroactive legislation, courts read laws as prospective in application unless the legislature has unambiguously instructed retroactivity.¹³ The presumption against retroactivity will generally coincide with legislative and public expectations as it accords with widely held intuitions about how statutes ordinarily operate.¹⁴

Use of present tense.

A statute's undeviating use of the present tense is a striking indicator of its prospective orientation.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Absent violation of specific constitutional provisions, potential unfairness of retroactive civil legislation is not sufficient reason for court to fail to give statute its intended scope. [Bank Markazi v. Peterson](#), 136 S. Ct. 1310 (2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 Colo.—[In re Estate of DeWitt](#), 54 P.3d 849 (Colo. 2002).
Md.—[Allstate Ins. Co. v. Kim](#), 376 Md. 276, 829 A.2d 611 (2003).
Ohio—[State ex rel. Kilbane v. Indus. Comm.](#), 91 Ohio St. 3d 258, 2001-Ohio-34, 744 N.E.2d 708 (2001).
Clear intention
Ga.—[Bickford v. Yancey Development Co., Inc.](#), 276 Ga. 814, 585 S.E.2d 78 (2003).
Explicit expression not required
The intent of the legislature to apply legislation retroactively need not be explicitly expressed in the legislation.
Colo.—[Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs](#), 948 P.2d 1002 (Colo. 1997), as modified on denial of reh'g, (Dec. 15, 1997).
- 2 U.S.—[Fernandez-Vargas v. Gonzales](#), 548 U.S. 30, 126 S. Ct. 2422, 165 L. Ed. 2d 323 (2006).
- 3 U.S.—[Landgraf v. USI Film Products](#), 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

- 4 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
 - 5 U.S.—*I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
 - 6 U.S.—*I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); *Martin v. Hadix*, 527 U.S. 343, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999).
 - 7 U.S.—*AT & T Corp. v. Hulteen*, 556 U.S. 701, 129 S. Ct. 1962, 173 L. Ed. 2d 898 (2009).
 - 8 Ohio—*State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St. 3d 258, 2001-Ohio-34, 744 N.E.2d 708 (2001).
 - 9 Colo.—*In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002).
Fla.—*Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494 (Fla. 1999).
Md.—*Allstate Ins. Co. v. Kim*, 376 Md. 276, 829 A.2d 611 (2003).
- Substantive or merely remedial law**
- When an express legislative intent for retroactivity of a statute is found, the second part of the test for unconstitutional retroactivity requires a determination as to whether the law is substantive, rendering it unconstitutionally retroactive, or merely remedial.
- 10 Ohio—*State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St. 3d 258, 2001-Ohio-34, 744 N.E.2d 708 (2001).
 - 11 U.S.—*Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S. Ct. 2422, 165 L. Ed. 2d 323 (2006).
 - 12 U.S.—*Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).
 - 13 U.S.—*Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S. Ct. 2422, 165 L. Ed. 2d 323 (2006).
 - 14 U.S.—*Vartelas v. Holder*, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012).
 - 15 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
U.S.—*Carr v. U.S.*, 560 U.S. 438, 130 S. Ct. 2229, 176 L. Ed. 2d 1152 (2010).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

1. In General

§ 647. Validity in absence of constitutional prohibition

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1553

The mere fact that a statute is retrospective does not invalidate it in the absence of an express prohibition against such laws.

Although it has been stated broadly that retroactivity is not favored in law,¹ the Federal Constitution neither does not explicitly prohibit the retroactive application of civil laws.² Similar statements have been made with respect to a number of the state constitutions.³

In the absence of such an express provision, a law is not invalid merely because retrospective or retroactive in operation.⁴ However, retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions.⁵ A state court may apply its own precedents retroactively without violating due process so long as such application does not amount to an ex post facto law.⁶ Furthermore, absent a violation of specific constitutional provisions, the potential unfairness of retroactive civil legislation is

not a sufficient reason for a court to fail to give a statute its intended scope.⁷ Decisions rendered in states whose constitutions forbid retroactive laws are not pertinent in a state having no such provision.⁸

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Footnotes

- 1 U.S.—*Travelers Ins. Co. v. Marshall*, 634 F.2d 843 (5th Cir. 1981).
Idaho—*Guzman v. Piercy*, 155 Idaho 928, 318 P.3d 918 (2014).
Nev.—*Cnty. of Clark v. LB Props., Inc.*, 315 P.3d 294, 129 Nev. Adv. Op. No. 96 (Nev. 2013).
S.C.—*State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013).
Wis.—*Counts v. State*, 2014 WY 151, 338 P.3d 902 (Wyo. 2014).
Retroactive statutes forbidden by first principles of justice
Ga.—*London Guarantee & Acc. Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943).
- 2 U.S.—*McPhail v. Warden, Attica Correctional Facility*, 539 F. Supp. 165 (S.D. N.Y. 1982), judgment aff'd, 707 F.2d 67 (2d Cir. 1983).
Pa.—*Cleveland v. Johns-Manville Corp.*, 547 Pa. 402, 690 A.2d 1146 (1997).
S.D.—*People in Interest of S. H.*, 323 N.W.2d 851 (S.D. 1982).
Power of Congress
Congress has the power to enact laws with retrospective effect.
U.S.—*I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001).
- 3 Cal.—*In re Marriage of Bouquet*, 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976).
Pa.—*Cleveland v. Johns-Manville Corp.*, 547 Pa. 402, 690 A.2d 1146 (1997).
Wyo.—*Goshen Irr. Dist. v. Wyoming State Bd. of Control*, 926 P.2d 943 (Wyo. 1996).
- 4 U.S.—*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).
Conn.—*Bergeson v. City of New London*, 269 Conn. 763, 850 A.2d 184 (2004).
N.J.—*Berkley Condominium Ass'n, Inc. v. Berkley Condominium Residences, Inc.*, 185 N.J. Super. 313, 448 A.2d 510 (Ch. Div. 1982).
N.Y.—*Franza v. Olin*, 73 A.D.3d 44, 897 N.Y.S.2d 804 (4th Dep't 2010).
W. Va.—*Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs, Workers' Compensation Div.*, 214 W. Va. 95, 586 S.E.2d 170 (2003).
Legislation affecting aliens
U.S.—*U.S. ex rel. Barile v. Murff*, 116 F. Supp. 163 (D. Md. 1953).
Law taking property
By retroactive legislation, property may be taken from a person, which, were it not for such legislation, he or she could have held as his or her own.
U.S.—*White v. U.S.*, 299 F. 855 (E.D. Va. 1924), aff'd, 270 U.S. 175, 46 S. Ct. 274, 70 L. Ed. 530 (1926).
Care of insane or indigent persons
(1) A statute allowing a state to recover against the estate of an insane person for sums expended by it for support of such persons after commitment to an institution is not invalid because retroactive and applicable to persons theretofore committed.
Conn.—*State v. Romme*, 93 Conn. 571, 107 A. 519 (1919).
(2) A statute providing for recovery of the cost of care and maintenance of persons admitted to designated charitable institutions of the state as indigent, where such persons cease to be indigent, is not unconstitutional notwithstanding the statute provides for recovery for care and maintenance furnished before the indigence ceased.
N.C.—*State Hospital at Raleigh v. Security Nat. Bank*, 207 N.C. 697, 178 S.E. 487 (1935).
- 5 Conn.—*Bergeson v. City of New London*, 269 Conn. 763, 850 A.2d 184 (2004).
- 6 Ohio—*State v. Wickline*, 74 Ohio St. 3d 369, 1996-Ohio-19, 658 N.E.2d 1052 (1996).
Ex post facto laws, generally, see §§ 671 to 695.
- 7 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
- 8 Fla.—*State ex rel. Jacksonville Gas Co. v. Lee*, 112 Fla. 109, 150 So. 225 (1933).

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16A C.J.S. Constitutional Law § 648

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

a. In General

§ 648. Purpose and effect of a constitutional prohibition on retroactive statutes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1553

Though retrospective laws are unconstitutional and void because they are injurious and unjust, a statute is not necessarily invalid because it is retroactive even in a state whose constitution expressly prohibits the enactment of retroactive laws.

Retrospective laws are unconstitutional and void because they are injurious, oppressive, and unjust.¹ The purpose of constitutional prohibitions against retroactive laws is to bar the legislatures from passing new laws that destroy accrued substantive rights and that reach back and create new burdens, new duties, new obligations, or new liabilities.² The rule bars the State from imposing new duties and obligations upon past conduct and transactions and assures the individual that he or she may rely upon the law as it is written and not later be subject to new obligations.³

The courts have taken cognizance of, and made reference to, state constitutional provisions expressly prohibiting the enactment of retrospective laws as such.⁴ Nevertheless, even in such jurisdictions, not all laws retrospective or retroactive in their nature

or operation come under the constitutional condemnation,⁵ nor do all such laws conflict with the principles of justice on which the prohibition against retroactive laws is based.⁶ Like prospective acts, retroactive legislation still enjoys a presumption of constitutionality.⁷ However, since retroactive legislation often unsettles important rights, it is viewed with some degree of suspicion.⁸

CUMULATIVE SUPPLEMENT

Cases:

Restrictions that the Constitution places on retroactive legislation are of limited scope. [Bank Markazi v. Peterson](#), 136 S. Ct. 1310 (2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 N.H.—[In re Goldman](#), 151 N.H. 770, 868 A.2d 278 (2005).
- 2 Ohio—[Coca-Cola Bottling Corp. v. Lindley](#), 54 Ohio St. 2d 1, 8 Ohio Op. 3d 1, 10 Ohio Op. 3d 254, 374 N.E.2d 400 (1978).
Interference with expectations
 The prohibition of retrospective laws is designed to prevent the legislature from interfering with the expectations of persons as to the legal significance of their actions taken prior to the enactment of a law.
 N.H.—[State v. Lambert](#), 119 N.H. 881, 409 A.2d 794 (1979).
Prevention of unfairness
 The purpose of prohibition of retrospective laws is to prevent the unfairness entailed in altering the legal consequences of events or transactions after the fact.
 Colo.—[Peoples Natural Gas Division of Northern Natural Gas Co. v. Public Utilities Commission](#), 197 Colo. 152, 590 P.2d 960 (1979).
- 3 Ohio—[Coca-Cola Bottling Corp. v. Lindley](#), 54 Ohio St. 2d 1, 8 Ohio Op. 3d 1, 10 Ohio Op. 3d 254, 374 N.E.2d 400 (1978).
- 4 Ga.—[Deal v. Coleman](#), 294 Ga. 170, 751 S.E.2d 337 (2013).
 Md.—[State v. Goldberg](#), 437 Md. 191, 85 A.3d 231 (2014).
 Mo.—[Doe v. Replogle](#), 445 S.W.3d 573 (Mo. Ct. App. S.D. 2013), reh'g and/or transfer denied, (Nov. 6, 2013) and transfer denied, (Feb. 4, 2014) and cert. denied, 134 S. Ct. 2853, 189 L. Ed. 2d 809 (2014).
 N.H.—[In re Goldman](#), 151 N.H. 770, 868 A.2d 278 (2005).
 Ohio—[Tribett v. Shepherd](#), 2014-Ohio-4320, 20 N.E.3d 365 (Ohio Ct. App. 7th Dist. Belmont County 2014).
- 5 Colo.—[In re Estate of DeWitt](#), 54 P.3d 849 (Colo. 2002).
 Ohio—[Bielat v. Bielat](#), 87 Ohio St. 3d 350, 2000-Ohio-451, 721 N.E.2d 28 (2000).
 Tex.—[Subaru of America, Inc. v. David McDavid Nissan, Inc.](#), 84 S.W.3d 212 (Tex. 2002).
- 6 Ga.—[Bullard v. Holman](#), 184 Ga. 788, 193 S.E. 586, 113 A.L.R. 763 (1937).
- 7 Wis.—[Neiman v. American Nat. Property and Cas. Co.](#), 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160 (2000).
- 8 Wis.—[Neiman v. American Nat. Property and Cas. Co.](#), 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160 (2000).

16A C.J.S. Constitutional Law § 649

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VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

a. In General

§ 649. Determination of validity of retrospective statute

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1553

The validity of a retrospective statute is determined by whether in its retroactive operation it is subject to some other fundamental objection or violates some constitutional provision.

Since mere retroactivity is not objectionable under an express provision, the validity of a retrospective statute is determined by its effect,¹ that is, by whether in its retroactive operation it is subject to some other fundamental objection² or violates some constitutional provision.³ The essential inquiry, in deciding whether a statute can be applied retroactively absent some clear manifestation that this was the legislative intent, is whether the statute attaches new legal consequences to events completed before its enactment.⁴

Retrospective application of a law will collide with the presumption against retroactivity where such application will take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past.⁵ Accordingly, a statute may not operate retroactively where it would

impair an obligation of contract,⁶ and the total destruction of contractual expectations is not necessary for a finding of substantial impairment of a contractual right, sufficient to render the retroactive application of a statute unconstitutional.⁷ In addition, a statute may not operate retroactively where it would violate a person's due process rights⁸ or partake of the nature of an ex post facto law.⁹

Under some authorities, the validity of retroactive legislation is determined by a consideration of its reasonableness,¹⁰ and whether the law is in furtherance of the police powers of the State,¹¹ and an enactment under the police power does not ordinarily violate any constitutional prohibition against retroactive statutes.¹² The courts compare the public interest in the law with the private interests that are overturned by it.¹³ The test is whether the legislation represents a rational means to achieve legitimate ends,¹⁴ not strictly whether the law abrogates a vested right.¹⁵ Furthermore, the justification for prospective legislation may not suffice for retroactive legislation.¹⁶

The criteria to be considered in determining whether the legislation can pass such test include the reliance interests of the parties affected,¹⁷ whether the private interest was in an area previously subject to regulatory control,¹⁸ the equities of imposing the legislative burdens,¹⁹ and the inclusion of statutory provisions designed to moderate the impact of the new law.²⁰ Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.²¹ While a statutory amendment which merely clarifies existing law may be applied retroactively without constitutional concern,²² the legislature cannot create retroactive authority by passing so-called "clarifying" legislation.²³

The legislature may not, by retroactive statute, impose a liability where none existed before,²⁴ and the retroactivity clause of the state constitution nullifies those new laws that reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective.²⁵ Furthermore, the legislature may not enact a law to operate retrospectively which it could not have passed in the first instance to operate prospectively.²⁶

Judicial decisions.

There is authority that a change of substantive law by a judicial opinion contrary to an earlier view taken by the court is not a retroactive law within the constitutional prohibition²⁷ and that a constitutional prohibition against the passage of any act retrospective in its operation applies only to the enactment of legislation and not to decisions by courts.²⁸ However, there is also authority that judicial decisions applied retroactively can raise due process concerns²⁹ and that the rule that courts must apply the law in effect at the time it renders its decision applies only to the application of judicial decisions rather than to situations involving the retroactive application of state statutes, ordinances, or regulations.³⁰ Under still other authority, a judicial decision interpreting a statute may be applied retroactively unless the decision denies due process by being both unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.³¹

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Footnotes

¹ Mont.—*State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979).

Retrograde act of grace

The spirit of prohibition on retroactive legislation is to prevent retrograde exactions by the government from its citizens, and a statute concerning compensation for land taken, being a retrograde act of grace, was not subject to such prohibition.

- 2 U.S.—*Marston v. Red River Levee and Drainage Dist.*, 632 F.2d 466 (5th Cir. 1980).
N.Y.—*In re Gato's Estate*, 276 A.D. 651, 97 N.Y.S.2d 171 (1st Dep't 1950), order aff'd, 301 N.Y. 653, 93 N.E.2d 924 (1950).
- 3 N.Y.—*Periconi v. State*, 91 Misc. 2d 823, 398 N.Y.S.2d 959 (Ct. Cl. 1977).
Wash.—*State v. Douty*, 92 Wash. 2d 930, 603 P.2d 373 (1979).
- 4 U.S.—*Vartelas v. Holder*, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012).
- 5 U.S.—*Vartelas v. Holder*, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012).
Laws affecting rights, generally, see §§ 650 to 653.
- 6 Md.—*Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 805 A.2d 1061 (2002).
N.J.—*State Troopers Fraternal Ass'n of New Jersey, Inc. v. State*, 149 N.J. 38, 692 A.2d 519 (1997).
Pa.—*Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 281 (2002).
- 7 Ill.—*First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 209 Ill. Dec. 657, 651 N.E.2d 1105, 54 A.L.R.5th 909 (1995).
- 8 La.—*Pounds v. Schori*, 377 So. 2d 1195 (La. 1979), overturned due to legislative action 2005 La. Sess. Law Serv. Act 192.
Md.—*Police Patrol Sec. Systems, Inc. v. Prince George's County*, 378 Md. 702, 838 A.2d 1191 (2003).
- 9 Md.—*Police Patrol Sec. Systems, Inc. v. Prince George's County*, 378 Md. 702, 838 A.2d 1191 (2003).
N.D.—*State v. Burr*, 1999 ND 143, 598 N.W.2d 147 (N.D. 1999).
As to ex post facto laws, generally, see §§ 671 to 695.
Rule applicable to constitutional provision
U.S.—*Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866).
- 10 Mass.—*Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 380 Mass. 212, 402 N.E.2d 501 (1980).
Irrational or arbitrary retroactive features
U.S.—*Petrolite Corp. v. U.S. Environmental Protection Agency*, 519 F. Supp. 966 (D.D.C. 1981).
- 11 Mass.—*American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 372 N.E.2d 520 (1978).
N.H.—*Hayes v. LeBlanc*, 114 N.H. 141, 316 A.2d 187 (1974).
As to police power, generally, see §§ 699 to 720.
Public policy
A determination that retroactive application of a law impairs a vested right is not necessarily dispositive of the inquiry into whether the law can operate retroactively because such a finding may be balanced against public health and safety concerns, the State's police powers to regulate certain practices, and other public policy considerations.
Colo.—*Taylor Morrison of Colorado, Inc. v. Bemas Construction, Inc.*, 2014 COA 10, 2014 WL 323490 (Colo. App. 2014).
- 12 Ga.—*Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources*, 266 Ga. 253, 466 S.E.2d 197 (1996).
- 13 U.S.—*Pension Ben. Guaranty Corp. v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979), judgment aff'd, 630 F.2d 4 (1st Cir. 1980) (rejected on other grounds by, *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1124, 39 Fed. R. Serv. 2d 898 (1st Cir. 1984)).
Mass.—*American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 372 N.E.2d 520 (1978).
- 14 Colo.—*In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002).
Md.—*Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 805 A.2d 1061 (2002).
Economic legislation
The rational basis test is applied when the court reviews the constitutionality of retroactive economic legislation.
Wis.—*Neiman v. American Nat. Property and Cas. Co.*, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160 (2000).
Altering public pension benefits
Legislation retroactively altering public pension benefits is constitutional if retroactive application is justified by a rational legislative purpose.
R.I.—*Retired Adjunct Professors of the State of R.I. v. Almond*, 690 A.2d 1342, 117 Ed. Law Rep. 205 (R.I. 1997).
- 15 **Merely conclusory label**
Wash.—*Application of Santore*, 28 Wash. App. 319, 623 P.2d 702 (Div. 2 1981).

- 16 Wis.—*Neiman v. American Nat. Property and Cas. Co.*, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160 (2000).
- 17 U.S.—*S & M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867 (C.D. Cal. 1982).
Wash.—*Application of Santore*, 28 Wash. App. 319, 623 P.2d 702 (Div. 2 1981).
Reliance strengthens case for reading newly enacted law prospectively
Although not a necessary predicate for invoking the antiretroactivity principle, the likelihood of reliance on prior law strengthens the case for reading a newly enacted law prospectively.
U.S.—*Vartelas v. Holder*, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012).
Restrictive covenant
The purchaser of real property relied on a law that a restrictive covenant could last no longer than 20 years, and thus an amendment to the law which permitted restrictive covenants to be extended could operate prospectively only since it affected the purchaser's substantive rights.
Ga.—*Appalachee Enterprises, Inc. v. Walker*, 266 Ga. 35, 463 S.E.2d 896 (1995).
Avoiding potential liability
The justification for a law must be examined and weighed against the possibility that a person who could have anticipated a potential liability would have avoided it by altering his or her course of conduct.
N.J.—*Matter of Kaplan*, 178 N.J. Super. 487, 429 A.2d 590 (App. Div. 1981).
- 18 U.S.—*S & M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867 (C.D. Cal. 1982).
- 19 U.S.—*S & M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867 (C.D. Cal. 1982).
- 20 U.S.—*S & M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867 (C.D. Cal. 1982).
- 21 U.S.—*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976).
Mo.—*La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523 (Mo. 1999).
Tex.—*In re A.V.*, 113 S.W.3d 355 (Tex. 2003).
- 22 Mass.—*Briggs v. Com.*, 429 Mass. 241, 707 N.E.2d 355 (1999).
- 23 Pa.—*Petrovick v. Com., Dept of Transp., Bureau of Driver Licensing*, 559 Pa. 614, 741 A.2d 1264 (1999).
- 24 Mass.—*Mulligan v. Hilton*, 305 Mass. 5, 24 N.E.2d 676, 133 A.L.R. 376 (1940).
- 25 Ohio—*Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St. 3d 308, 2001-Ohio-46, 744 N.E.2d 751 (2001).
- 26 Va.—*Allen v. Mottley Const. Co.*, 160 Va. 875, 170 S.E. 412 (1933).
- 27 U.S.—*U.S. ex rel. Waters v. Bensinger*, 507 F.2d 103 (7th Cir. 1974).
- 28 Mo.—*State ex rel. Clark v. Shain*, 343 Mo. 66, 119 S.W.2d 971 (1938).
- 29 Wash.—*State v. Aho*, 137 Wash. 2d 736, 975 P.2d 512 (1999).
Violation of Federal Due Process Clause
S.C.—*State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1998).
- 30 Mont.—*Porter v. Galarneau*, 275 Mont. 174, 911 P.2d 1143 (1996).
- 31 Neb.—*State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

16A C.J.S. Constitutional Law § 650

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A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

b. Laws Affecting Settled Rights

§ 650. Validity of retroactive laws disturbing settled rights; new obligations or liabilities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  [1558](#), [1559](#)

The legislature may not constitutionally enact retrospective laws disturbing or destroying existing or settled legal rights or creating new obligations with respect to past transactions.

As a general rule, retrospective laws are unconstitutional if they disturb or destroy existing or vested rights¹ as where they disturb or destroy settled rights embodied in judgments or judicial decisions.² This rule is also applicable to laws which create new obligations with respect to past transactions³ as by creating a substantive right⁴ or a cause of action where none existed before.⁵

In the context of retroactivity, a "vested right" is more than a mere expectation⁶ based on the anticipated continuance of the existing law.⁷ It has been said that a right is "vested" only when the right to assert it does not depend on the common law or the statute under which it was acquired but rather has an independent existence.⁸

A common-law cause of action is a vested right within the rule against retrospective operation of statutes⁹ regardless of whether a suit upon that action has been filed.¹⁰ Even clarifying legislation,¹¹ or modifications to police power enactments,¹² or procedural changes,¹³ cannot be carried to the point of destroying accrued or vested rights.

CUMULATIVE SUPPLEMENT

Cases:

Once a property right vests, the due process guarantee of state constitution prohibits application of legislation that would disturb vested substantive rights by retroactively changing the law that applies to completed events. [A.R.S. Const. Art. 2, § 4](#). [In re Marriage of Howell](#), 238 Ariz. 407, 361 P.3d 936 (2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ga.—[Deal v. Coleman](#), 294 Ga. 170, 751 S.E.2d 337 (2013).
Md.—[State Ethics Com'n v. Evans](#), 382 Md. 370, 855 A.2d 364 (2004).
N.H.—[Professional Fire Fighters of New Hampshire v. State](#), 107 A.3d 1229 (N.H. 2014).
Ohio—[Hyle v. Porter](#), 117 Ohio St. 3d 165, 2008-Ohio-542, 882 N.E.2d 899 (2008).
Tex.—[Subaru of America, Inc. v. David McDavid Nissan, Inc.](#), 84 S.W.3d 212 (Tex. 2002).
Retroactive impairment of vested substantive rights prohibited
U.S.—[In re Kyle](#), 510 B.R. 804 (Bankr. S.D. Ohio 2014) (under Ohio Constitution).
"Matured" rights protected
Okla.—[King Mfg. v. Meadows](#), 2005 OK 78, 127 P.3d 584 (Okla. 2005).
Definition of "retrospective in operation"
A law is "retrospective in operation," for purposes of a state's constitutional prohibition of laws that are retrospective in operation, if it takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties, or disabilities with respect to past transactions.
Mo.—[State v. Young](#), 362 S.W.3d 386 (Mo. 2012).
Inquiries on determination
In determining whether a retroactive statute impairs or destroys vested rights, the most important inquiries are whether the public interest is advanced or retarded, whether the retroactive provision gives effect to or defeats the bona fide intentions or reasonable expectations of affected persons, and whether the statute surprises persons who have long relied on a contrary state of the law.
Colo.—[In re Estate of DeWitt](#), 54 P.3d 849 (Colo. 2002).
Tenn.—[In re D.A.H.](#), 142 S.W.3d 267 (Tenn. 2004).
For the general discussion within this article of the concept of vested rights, see §§ 472 to 505.
- 2 N.C.—[Piedmont Memorial Hospital v. Guilford County](#), 221 N.C. 308, 20 S.E.2d 332 (1942).
Clear legislative intent immaterial
Neb.—[Karrer v. Karrer](#), 190 Neb. 610, 211 N.W.2d 116 (1973).
Foreclosure judgment
N.Y.—[Ehrenberg v. Green](#), 19 N.Y.S.2d 470 (County Ct. 1939).
- 3 Ga.—[DeKalb County v. State](#), 270 Ga. 776, 512 S.E.2d 284 (1999).
Ohio—[Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision](#), 91 Ohio St. 3d 308, 2001-Ohio-46, 744 N.E.2d 751 (2001).
- 4 La.—[Prejean v. Dixie Lloyds Ins. Co.](#), 655 So. 2d 303 (La. 1995), opinion modified on other grounds on reh'g, 660 So. 2d 836 (La. 1995).
Tex.—[Heights Hospital v. Patterson](#), 269 S.W.2d 810 (Tex. Civ. App. Waco 1954), writ refused.

- 5 La.—[Anderson v. Avondale Industries, Inc.](#), 798 So. 2d 93 (La. 2001).
- Mo.—[Mendelsohn v. State Bd. of Registration for the Healing Arts](#), 3 S.W.3d 783 (Mo. 1999) (overruled on other grounds by, [Albanna v. State Bd. of Registration for Healing Arts](#), 293 S.W.3d 423 (Mo. 2009)).
- 6 Md.—[Muskin v. State Dept. of Assessments and Taxation](#), 422 Md. 544, 30 A.3d 962 (2011).
- Wash.—[In re Estate of Haviland](#), 177 Wash. 2d 68, 301 P.3d 31 (2013).
- 7 Md.—[Muskin v. State Dept. of Assessments and Taxation](#), 422 Md. 544, 30 A.3d 962 (2011).
- For the discussion within this article of vested rights with respect to the continuance of an existing law, see § 475.
- 8 U.S.—[In re Rivera](#), 513 B.R. 742 (Bankr. D. Colo. 2014) (under Colorado law).
- Colo.—[Taylor Morrison of Colorado, Inc. v. Bemas Construction, Inc.](#), 2014 COA 10, 2014 WL 323490 (Colo. App. 2014).
- For the general discussion within this article of the concept of vested rights, see §§ 472 to 505.
- 9 Ill.—[Josic v. Josic](#), 78 Ill. App. 3d 347, 33 Ill. Dec. 871, 397 N.E.2d 204 (1st Dist. 1979).
- N.H.—[Lozier v. Brown Co.](#), 121 N.H. 67, 426 A.2d 29 (1981).
- N.Y.—[Periconi v. State](#), 91 Misc. 2d 823, 398 N.Y.S.2d 959 (Ct. Cl. 1977).
- Liability of public bodies and employees**
- (1) A statute conferring sovereign immunity upon a state university did not extend immunity from a malpractice suit to a member of the medical faculty as such an extension would involve the unconstitutionally impermissible abolition of an existing common-law right of action for personal injury.
- Ky.—[University of Louisville v. O'Bannon](#), 770 S.W.2d 215, 53 Ed. Law Rep. 1306 (Ky. 1989).
- (2) A statutory amendment, which states that the exclusive remedy for an injury suffered as the result of the act of an officer, employee, or state agent is by an action against the governmental entity, and which was made expressly applicable to all actions pending on its effective date, was unconstitutional to the extent that it would retroactively eliminate a plaintiff's vested right to sue a state employee for negligence resulting in an accident.
- Fla.—[State, Dept. of Transp. v. Knowles](#), 388 So. 2d 1045 (Fla. 2d DCA 1980), decision aff'd, 402 So. 2d 1155 (Fla. 1981).
- (3) Trespass claims against the State and a department thereof alleging that the defendants' negligent supervision of a dam caused a flood and resulting in a loss could not be extinguished by an act creating statutory sovereign immunity.
- Pa.—[Gibson v. Com.](#), 490 Pa. 156, 415 A.2d 80 (1980).
- Alienation of affections**
- (1) The plaintiff's right to bring an action for alienation of affections was a substantive right which had vested at the time of the repeal of this cause of action, and thus the portion of the law which made the repeal of a cause of action for alienation of affections retrospective as to pending actions was unconstitutional.
- Ga.—[Enger v. Erwin](#), 245 Ga. 753, 267 S.E.2d 25 (1980).
- (2) Where a cause of action for alienation of affections vested prior to the repeal of the statute on which the complaint was based, it survived the repeal even though the action was filed after the repeal.
- Ga.—[Brown v. Hauser](#), 249 Ga. 513, 292 S.E.2d 1 (1982).
- 10 N.H.—[Lozier v. Brown Co.](#), 121 N.H. 67, 426 A.2d 29 (1981).
- 11 Conn.—[Bhinder v. Sun Co., Inc.](#), 263 Conn. 358, 819 A.2d 822 (2003).
- 12 Ga.—[Goldrush II v. City of Marietta](#), 267 Ga. 683, 482 S.E.2d 347 (1997).
- As to police power, generally, see §§ 699 to 720.
- 13 Cal.—[Western Security Bank v. Superior Court](#), 15 Cal. 4th 232, 62 Cal. Rptr. 2d 243, 933 P.2d 507, 32 U.C.C. Rep. Serv. 2d 534 (1997).
- N.J.—[City of Newark v. Padula](#), 26 N.J. Super. 251, 97 A.2d 735 (App. Div. 1953).
- As to power of the legislature to effect procedural changes retroactively, generally, see § 654.
- Revision of judgment for alimony**
- The retroactive application of a statute governing the revision of a judgment for permanent alimony so as to permit consideration of evidence of a change in the financial status of the recipient spouse would be unconstitutional.
- Ga.—[Shure v. Shure](#), 245 Ga. 36, 262 S.E.2d 800 (1980).

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16A C.J.S. Constitutional Law § 651

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

b. Laws Affecting Settled Rights

§ 651. Retroactive laws not affecting substantial rights

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  [1558](#), [1559](#)

Despite their retroactive operation, statutes are upheld where they have no adverse effect on vested or substantial rights, or merely regulate rights or change their form, particularly where such legislation is in the proper exercise of police power.

Despite their retroactive operation, statutes are upheld where they have no adverse effect on vested or substantial rights¹ or merely regulate rights² or change their form,³ particularly where such legislation is in the proper exercise of police power⁴ or which concerns the public interest or relates merely to governmental matters.⁵ Where a statute merely cures defects, enforces existing obligations, or confirms existing rights, it does not impair the substantive rights of a party.⁶ In order to render a retrospective law invalid as destroying or disturbing a vested right, the right must be something more than a mere expectation based on an anticipated continuance of the existing law.⁷ It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of a demand or a legal exemption from a demand made by another.⁸

If, before rights have become vested in particular individuals, the convenience of the state induces amendment or repeal of the laws, these individuals have no cause to complain.⁹ Accordingly, rights conferred by statute may be modified or abolished by subsequent legislation without violation of any constitutional provision,¹⁰ and this is especially true where the statute expressly provides that the rights conferred by it shall exist subject to the power of the legislature to amend or repeal.¹¹

Thus, the federal regulation of future action based on rights previously acquired by the person regulated is not prohibited by the Federal Constitution.¹² Likewise, a retroactive statute may be valid if it deals with transactions closed after, but initiated before, its enactment¹³ or creates substantive rights which have any prospective field of operation.¹⁴ Even an express prohibition against retrospective laws does not protect contingent,¹⁵ imperfect,¹⁶ or inchoate¹⁷ rights.

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Footnotes

- 1 U.S.—*Lichter v. U.S.*, 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948).
Pa.—*Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 281 (2002).
R.I.—*Theta Properties v. Ronci Realty Co., Inc.*, 814 A.2d 907 (R.I. 2003).
- 2 U.S.—*Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).
Colo.—*W-Y Ground Water Management Dist. v. Goeglein*, 196 Colo. 230, 585 P.2d 910 (1978).
- 3 Mo.—*Willhite v. Rathburn*, 332 Mo. 1208, 61 S.W.2d 708 (1933).
- 4 N.Y.—*Attorney-General v. Katz*, 104 Misc. 2d 846, 428 N.Y.S.2d 982 (Sup 1980).
- 5 Ga.—*Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975).
Ohio—*State ex rel. McGovern v. Board of Elections of Cuyahoga County*, 24 Ohio Misc. 135, 53 Ohio Op. 2d 147, 263 N.E.2d 586 (C.P. 1970).
- 6 Ga.—*DeKalb County v. State*, 270 Ga. 776, 512 S.E.2d 284 (1999).
- 7 Ill.—*Josic v. Josic*, 78 Ill. App. 3d 347, 33 Ill. Dec. 871, 397 N.E.2d 204 (1st Dist. 1979).
Ohio—*In re Emery*, 59 Ohio App. 2d 7, 13 Ohio Op. 3d 44, 391 N.E.2d 746, 9 A.L.R.4th 1214 (1st Dist. Hamilton County 1978).
- 8 Ill.—*Josic v. Josic*, 78 Ill. App. 3d 347, 33 Ill. Dec. 871, 397 N.E.2d 204 (1st Dist. 1979).
- 9 Ill.—*Grobsmith v. Kempiners*, 88 Ill. 2d 399, 58 Ill. Dec. 722, 430 N.E.2d 973 (1981).
Tex.—*State Bd. of Registration for Professional Engineers v. Wichita Engineering Co.*, 504 S.W.2d 606 (Tex. Civ. App. Fort Worth 1973), writ refused n.r.e., (May 8, 1974).
- 10 Ill.—*Josic v. Josic*, 78 Ill. App. 3d 347, 33 Ill. Dec. 871, 397 N.E.2d 204 (1st Dist. 1979).
Invalid statute
N.Y.—*Parkchester Tenants' Ass'n, Inc. v. Yoswein*, 79 Misc. 2d 859, 361 N.Y.S.2d 519 (Sup 1974), order aff'd, 47 A.D.2d 721, 367 N.Y.S.2d 1009 (1st Dep't 1975).
- 11 Conn.—*Hagerty v. Administrator, Unemployment Compensation Act*, 137 Conn. 129, 75 A.2d 406, 20 A.L.R.2d 960 (1950).
- 12 U.S.—*Fleming v. Rhodes*, 331 U.S. 100, 67 S. Ct. 1140, 91 L. Ed. 1368 (1947); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).
Avoidance of security interest
A provision of the bankruptcy act providing for avoidance of a nonpurchase money security interest in household goods may constitutionally be applied retroactively to a security interest perfected prior to the enactment.
U.S.—*In re Middleton*, 7 B.R. 3 (Bankr. N.D. Ga. 1980).
Pension plan termination liability
Since the employer did not terminate a pension plan until after the effective date of an act establishing a pension plan termination insurance program, the imposition of employer liability was not unconstitutional on the theory that it was retroactively applied.
U.S.—*Concord Control, Inc. v. International Union, United Auto., Aerospace and Agr. Implement Workers of America*, 647 F.2d 701 (6th Cir. 1981).

- 13 Cal.—[People v. K. Sakai Co.](#), 56 Cal. App. 3d 531, 128 Cal. Rptr. 536 (1st Dist. 1976).
Colo.—[Hammer v. Real Estate Commission](#), 40 Colo. App. 260, 576 P.2d 191 (App. 1977).
- 14 Ala.—[Kemp v. Britt](#), 410 So. 2d 31 (Ala. 1982).
- 15 Ohio—[In re Emery](#), 59 Ohio App. 2d 7, 13 Ohio Op. 3d 44, 391 N.E.2d 746, 9 A.L.R.4th 1214 (1st Dist. Hamilton County 1978).
- Compensation for occupational disease**
N.C.—[Wood v. J. P. Stevens & Co.](#), 297 N.C. 636, 256 S.E.2d 692 (1979).
- 16 Minn.—[State ex rel. Rockwell v. State Bd. of Educ.](#), 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 (1942).
- 17 Colo.—[Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n](#), 956 P.2d 1260 (Colo. 1998).
Ga.—[Baranan v. State Bd. of Nursing Home Administrators](#), 143 Ga. App. 605, 239 S.E.2d 533 (1977).
- Right to sue on inchoate cause of action not a vested right**
Fla.—[Williams v. American Optical Corp.](#), 985 So. 2d 23, 41 A.L.R.6th 683 (Fla. 4th DCA 2008), *aff'd*, 73 So. 3d 120 (Fla. 2011).
- Motor vehicle licenses**
Ga.—[Keenan v. Hardison](#), 245 Ga. 599, 266 S.E.2d 205 (1980).
N.H.—[State v. Vashaw](#), 113 N.H. 636, 312 A.2d 692 (1973).
- Altering litigation posture of parties**
The enactment of a statute that alters the litigation posture of the parties to a pending lawsuit in regard to inchoate rights is not unconstitutionally retrospective.
Colo.—[City of Greenwood Village v. Petitioners for Proposed City of Centennial](#), 3 P.3d 427 (Colo. 2000).

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16A C.J.S. Constitutional Law § 652

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

b. Laws Affecting Settled Rights

§ 652. General principles governing retroactive legal changes applied to particular matters

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  [1558](#), [1559](#)

The general principles that the legislature may not constitutionally enact retrospective laws disturbing or destroying existing or vested rights, or creating new obligations with respect to past transactions, and that retroactive statutes are upheld where they have no adverse effect on vested or substantial rights, or merely regulate rights or change their form, have been applied in a number of particular contexts.

The general principles that the legislature may not constitutionally enact retrospective laws disturbing or destroying existing or vested rights, or creating new obligations with respect to past transactions, and that retroactive statutes are upheld where they have no adverse effect on vested or substantial rights, or merely regulate rights or change their form, have been applied in a number of particular contexts. For instance, it has been held that rights under a will vest immediately upon the death of the testator, and such rights cannot be affected by a statute which is passed years later.¹ Also, a retroactive statute interfering with the priority of a lien is invalid² as is a statute which creates a right of action for death by a wrongful act where the injury occurred before its passage and the death thereafter.³

Pension benefits.

An act has been held unconstitutional inasmuch as it provided retroactively that pension benefits being received by a retired state employee would be forfeited if the employee was convicted or pled guilty or no defense to a crime related to public office or public employment.⁴

Workers' compensation.

A subsequent amendment of a workers' compensation statute cannot operate retrospectively to affect in any way the rights and obligations which are fixed on the date of the injury.⁵ The retroactive application of laws that adversely affect substantive rights violates a workers' compensation claimant's constitutional rights because it constitutes a taking of property without due process of law.⁶

An amendment to workers' compensation statutes which provides that increased maximum workers' compensation benefits apply to any injuries incurred, claims made, or awards made before the amendments take effect is unconstitutional and void on the ground the amendment retroactively affects the obligations of employers already set by a previous law, at least where there is no emergency or catastrophe present justifying such retroactive application.⁷

Where a claimant, at the time of the adoption of a workers' compensation statute barring claims for benefits unless written notice of the specific part or parts of the body claimed to have been injured has been made within the prescribed period after injury or death, had the right to seek and be awarded compensation on a modification application, the application of the amendment so as to destroy such right is unconstitutional and void.⁸

Rights dependent on existence of marital or parental status.

Certain rights which depend upon the existence of the marital⁹ or parental¹⁰ status may be abridged by retroactive legislation, and this rule has been applied to statutes relating to divorce generally,¹¹ alimony,¹² allocation and distribution of marital property,¹³ and support,¹⁴ including child support.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Preservation of Religious Freedom Act did not apply retroactively to defendant who claimed that state had burdened the free exercise of her religion by charging her with child neglect; neither the Act nor its legislative history demonstrated that the General Assembly intended for the statute to apply retroactively, and Act was not remedial or procedural in nature, as defendant sought to use it to establish a defense to a criminal charge such that application of the Act would substantially affect vested rights or liabilities. [Tenn. Code Ann. §§ 4-1-407, 39-15-402\(c\)](#). [State v. Crank](#), 468 S.W.3d 15 (Tenn. 2015).

[END OF SUPPLEMENT]

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Footnotes

1 [Cal.—In re Thamm's Estate](#), 80 Cal. App. 2d 756, 183 P.2d 97 (2d Dist. 1947).

- 2 Iowa—*First Trust Joint Stock Land Bank of Chicago v. Smith*, 219 Iowa 658, 259 N.W. 192 (1935).
- 3 Tex.—*Slate v. City of Ft. Worth*, 193 S.W. 1143 (Tex. Civ. App. El Paso 1917).
- 4 Pa.—*Miller v. Com., State Emp. Retirement Bd.*, 50 Pa. Commw. 74, 411 A.2d 1300 (1980), order aff'd, 498 Pa. 103, 445 A.2d 88 (1981).
- 5 Okla.—*King Mfg. v. Meadows*, 2005 OK 78, 127 P.3d 584 (Okla. 2005).
- 6 Kan.—*Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).
- 7 Wis.—*State ex rel. Briggs & Stratton Corp. v. Noll*, 100 Wis. 2d 650, 302 N.W.2d 487 (1981) (overruled on other grounds by, *Neiman v. American Nat. Property and Cas. Co.*, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160 (2000)).
- 8 Ohio—*Gregory v. Flowers*, 32 Ohio St. 2d 48, 61 Ohio Op. 2d 295, 290 N.E.2d 181 (1972).
- 9 N.Y.—*Tucker v. Tucker*, 55 N.Y.2d 378, 449 N.Y.S.2d 683, 434 N.E.2d 1050 (1982).
- 10 **Termination of parental rights**
The ground for termination of parental rights, that the parent engaged in criminal conduct for which the parent was incarcerated and unable to care for the child for not less than two years from the date of filing the petition, did not violate the prohibition against retroactive application of the law when used to terminate the parental rights of the father, who was convicted prior to its enactment; the ground aimed to remedy the conditions of abused and neglected children, not to enhance punishment of the parent, and it did not disappoint any reasonable reliance the father could have placed on the law when he was convicted.
Tex.—*In re A.V.*, 113 S.W.3d 355 (Tex. 2003).
- 11 Colo.—*In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002).
- Ky.—*Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973).
- 12 Va.—*Eaton v. Davis*, 176 Va. 330, 10 S.E.2d 893 (1940).
- "Live-in lover" statutes**
Alimony judgments entered prior to the enactment of live-in lover provisions of divorce and alimony laws are not immune to modification based on statutes providing that there is no vested right to continue to receive full alimony from a former spouse while contemporaneously sharing living quarters with another mate.
Ga.—*Morris v. Morris*, 244 Ga. 120, 259 S.E.2d 65 (1979).
- Precluding modification**
Since any right of action for modification of alimony obligations which may have been available to the former husband under preexisting divorce laws derived solely from statute rather than common law, retrospective application of an act, which permitted the parties to a separation agreement, to preclude modification of such agreement, did not deprive the former husband of any vested common-law right of action.
Ill.—*Josic v. Josic*, 78 Ill. App. 3d 347, 33 Ill. Dec. 871, 397 N.E.2d 204 (1st Dist. 1979).
- 13 **Retirement benefits**
A statute governing allocation and distribution of marital property at the time of marital dissolution did not give the husband any vested rights in his wife's public teacher retirement benefits prior to such dissolution, and thus, the application of another statute which precluded treatment of her retirement benefits as marital property did not result in the unconstitutional retrospective application of the latter statute to impair any vested rights of the husband.
Mo.—*Silcox v. Silcox*, 6 S.W.3d 899 (Mo. 1999).
- 14 N.Y.—*Potak v. Potak*, 26 A.D.2d 950, 274 N.Y.S.2d 994 (2d Dep't 1966).
- 15 N.H.—*In re Goldman*, 151 N.H. 770, 868 A.2d 278 (2005).
- Lowering age of majority**
Wis.—*Behnke v. Behnke*, 103 Wis. 2d 449, 309 N.W.2d 21 (Ct. App. 1981).

16A C.J.S. Constitutional Law § 653

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VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

b. Laws Affecting Settled Rights

§ 653. General principles governing retroactive legal changes applied to particular matters—Laws impairing state, subdivision, or public rights

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  [1558](#), [1559](#)

The State may constitutionally pass retrospective laws waiving or impairing its own rights or those of its instrumental subdivisions or of the public generally.

As long as private lights are not infringed,¹ the State may constitutionally pass retrospective laws waiving or impairing its own rights² or those of its instrumental subdivisions³ or of the public generally.⁴ The State may impose upon itself or its subdivisions new liabilities with respect to transactions already past⁵ despite a constitutional prohibition against the retroactive imposition upon the people of counties or municipal subdivisions of new liabilities with respect to past transactions.⁶ Thus, statutes are valid which provide for the enforcement of existing moral obligations of the State or its subdivisions which were theretofore unenforceable,⁷ and the same is true of ordinances.⁸

On the other hand, there is authority that a constitutional prohibition against retroactive laws is equally applicable to city charter amendments.⁹ There is also authority that the legislature cannot assume a new liability for a past act where no moral obligation or public interest is involved.¹⁰

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Footnotes

- 1 Mo.—*State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971).
- 2 Mass.—*American Mut. Liability Ins. Co. v. Com.*, 379 Mass. 398, 398 N.E.2d 491 (1979).
Mo.—*Savannah R-III School Dist. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 120 Ed. Law Rep. 1239 (Mo. 1997).
- 3 Mo.—*State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971).
N.H.—*Appeal of Town of Newmarket*, 140 N.H. 279, 665 A.2d 1088 (1995).
School districts
Mo.—*Savannah R-III School Dist. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 120 Ed. Law Rep. 1239 (Mo. 1997).
Annexation by municipal corporation
A constitutional prohibition against destroying or impairing vested rights by retroactive laws did not prohibit the legislature from making limitations as to the size and extent of the area that a municipal corporation could annex retroactive to pending annexation proceedings.
Tex.—*Deacon v. City of Euless*, 405 S.W.2d 59 (Tex. 1966).
Mobile home requirements
A town, which challenged the alleged retrospective application of a statute governing the town's imposition of mobile home requirements, was not entitled to the benefit of a constitutional provision prohibiting retrospective laws.
N.H.—*Town of Nottingham v. Harvey*, 120 N.H. 889, 424 A.2d 1125 (1980).
- 4 Mo.—*State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971).
- 5 Pa.—*Girard Trust Co. v. City and County of Philadelphia*, 359 Pa. 319, 59 A.2d 124 (1948).
- 6 Colo.—*McNichols v. Police Protective Ass'n of Denver*, 121 Colo. 45, 215 P.2d 303 (1949) (overruled in part on other grounds by, *Police Pension and Relief Bd. v. Behnke*, 136 Colo. 288, 316 P.2d 1025 (1957)).
- 7 Wis.—*Leuch v. Egelhoff*, 260 Wis. 356, 51 N.W.2d 7 (1952).
Obligation of one subdivision to another
A local act providing for payment by a county to a city of the cost of pavement improvements abutting upon the property of the county is not unconstitutional as being retroactive or as depriving the county of vested rights.
Ala.—*Allredge v. Dunlap*, 240 Ala. 27, 197 So. 36 (1940).
- 8 Colo.—*Peterson v. McNichols*, 128 Colo. 137, 260 P.2d 938 (1953).
- 9 Ohio—*State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 72 Ohio St. 3d 69, 1995-Ohio-184, 647 N.E.2d 769 (1995).
- 10 Idaho—*State ex rel. Walton v. Parsons*, 58 Idaho 787, 80 P.2d 20 (1938).

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16A C.J.S. Constitutional Law § 654

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

c. Laws Affecting Remedies or Procedure

§ 654. Validity of retroactive laws affecting remedies or procedure, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1562

Unless expressly prohibited by constitutional provision, retrospective laws affecting only remedies or procedure for the enforcement of existing rights are valid even as applied to pending litigation.

Both in jurisdictions in which retrospective laws are expressly prohibited by constitutional provisions, and in jurisdictions in which there are no such inhibitions, retrospective laws which affect only remedies or procedure,¹ as distinguished from those affecting substantive or substantial rights,² are valid. This rule is subject to the qualification that the changes made are reasonable³ and not oppressive⁴ or arbitrary,⁵ do not disturb vested rights,⁶ or impair contractual obligations⁷ and provided that there are no special constitutional restrictions.⁸ Accordingly, unless expressly prohibited by constitutional provision or principle, such as a rule that a legislative act passed after the commencement of a suit cannot have the effect of destroying an existing defense to such suit,⁹ retrospective statutes affecting only remedies or procedure are valid even in their application to pending suits.¹⁰

A statute may be valid, even though it is retroactive, if it merely adds a remedy for an existing right,¹¹ or modifies an available remedy¹² or procedure,¹³ or directs the method by which the remedy is to operate,¹⁴ or impairs it for a reasonable and definite time,¹⁵ or removes an impediment in the way of legal proceedings.¹⁶ The legislature may even establish a new remedy where none existed before,¹⁷ at least as to actions against the State,¹⁸ and, conversely, may abolish an existing remedy entirely¹⁹ and substitute a new remedy²⁰ provided sufficient time or some reasonable or efficacious remedy for the exercise of the right remains.

Retrospective laws affecting remedies are, however, invalid where all remedies for an existing right are taken away²¹ or which so unreasonably encumber or limit the remedy as to render it useless or impracticable.²² A retroactive statute repealing a right of action depending on statutory authority and not reduced to a judgment prior to such repeal is valid.²³

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Footnotes

- 1 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
Colo.—*Taylor Morrison of Colorado, Inc. v. Bemas Construction, Inc.*, 2014 COA 10, 2014 WL 323490 (Colo. App. 2014).
Fla.—*Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418 (Fla. 4th DCA 2014).
Ga.—*Frantz v. Piccadilly Place Condominium Ass'n, Inc.*, 278 Ga. 103, 597 S.E.2d 354 (2004).
Kan.—*State v. Kurtz*, 340 P.3d 509 (Kan. Ct. App. 2014).
N.H.—*Maplevale Builders, LLC & a. v. Town of Danville*, 165 N.H. 99, 70 A.3d 427 (2013).
S.C.—*State v. Hilton*, 406 S.C. 580, 752 S.E.2d 549 (Ct. App. 2013).
Tex.—*Northwest Independent School Dist. v. Carroll Independent School Dist.*, 441 S.W.3d 684, 310 Ed. Law Rep. 523 (Tex. App. Fort Worth 2014), review denied, (Dec. 5, 2014).
Wis.—*In re Commitment of Alger*, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346 (2015).
"Remedial laws" defined
"Remedial laws" are those that substitute a new or different remedy for the enforcement of an accrued's right, as compared to the right itself, and generally come in the form of rules of practice, courses of procedure, or methods of review.
Ohio—*State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St. 3d 258, 2001-Ohio-34, 744 N.E.2d 708 (2001).
"Procedural laws" defined
"Procedural laws" are those that prescribe methods of enforcement of rights, duties, and obligations.
Ga.—*Henderson v. Department of Transp.*, 267 Ga. 90, 475 S.E.2d 614 (1996).
2 Colo.—*Taylor Morrison of Colorado, Inc. v. Bemas Construction, Inc.*, 2014 COA 10, 2014 WL 323490 (Colo. App. 2014).
Kan.—*State v. Kurtz*, 340 P.3d 509 (Kan. Ct. App. 2014).
N.H.—*Maplevale Builders, LLC & a. v. Town of Danville*, 165 N.H. 99, 70 A.3d 427 (2013).
S.C.—*State v. Hilton*, 406 S.C. 580, 752 S.E.2d 549 (Ct. App. 2013).
Distinction stated
For purposes of a state constitutional prohibition against retrospective legislation, the distinction between substantive and remedial statutes lies in the fact that "substantive statutes" create, eliminate, or modify vested rights or liabilities while "procedural statutes" relate only to remedies or modes of procedure to enforce such rights or liabilities.
Colo.—*Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs*, 948 P.2d 1002 (Colo. 1997), as modified on denial of reh'g, (Dec. 15, 1997).
Substituted service
Substituted service statutes, subjecting citizens of other states to jurisdiction of courts of the state enacting such statutes, are substantive, as well as procedural, as they first confer jurisdiction over persons not previously subject thereto.
U.S.—*Guerra De Chapa v. Allen*, 119 F. Supp. 129 (S.D. Tex. 1954).

- 3 U.S.—*In re Jackson*, 4 B.R. 293 (Bankr. D. Colo. 1980), judgment aff'd, 642 F.2d 1193 (10th Cir. 1981), judgment aff'd, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235, 35 U.C.C. Rep. Serv. 1 (1982) and U.S. v. Security Indus. Bank, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235, 35 U.C.C. Rep. Serv. 1 (1982).
- 4 N.H.—*In re Franklin Lodge of Elks No. 1280 BPOE*, 151 N.H. 565, 864 A.2d 325 (2004).
- 5 U.S.—*In re Jackson*, 4 B.R. 293 (Bankr. D. Colo. 1980), judgment aff'd, 642 F.2d 1193 (10th Cir. 1981), judgment aff'd, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235, 35 U.C.C. Rep. Serv. 1 (1982), and U.S. v. Security Indus. Bank, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235, 35 U.C.C. Rep. Serv. 1 (1982).
- 6 U.S.—*City of New York v. LaserShip, Inc.*, 33 F. Supp. 3d 303 (S.D. N.Y. 2014) (under New York law).
Ga.—*Frantz v. Piccadilly Place Condominium Ass'n, Inc.*, 278 Ga. 103, 597 S.E.2d 354 (2004).
Md.—*Graves v. State*, 215 Md. App. 339, 81 A.3d 516 (2013), cert. granted, 437 Md. 637, 89 A.3d 1104 (2014).
Tenn.—*Commissioners of Powell-Clinch Utility Dist. v. Utility Management Review Bd.*, 427 S.W.3d 375 (Tenn. Ct. App. 2013), appeal denied, (Nov. 13, 2013).
As to vested rights in remedies, generally, see §§ 498 to 505.
- Judicial rights**
Ky.—*Louisville Shopping Center, Inc. v. City of St. Matthews*, 635 S.W.2d 307 (Ky. 1982).
7 Ga.—*Frantz v. Piccadilly Place Condominium Ass'n, Inc.*, 278 Ga. 103, 597 S.E.2d 354 (2004).
Tenn.—*Commissioners of Powell-Clinch Utility Dist. v. Utility Management Review Bd.*, 427 S.W.3d 375 (Tenn. Ct. App. 2013), appeal denied, (Nov. 13, 2013).
- Statute of Frauds**
The Statute of Frauds pertaining to real estate brokers' contracts is unconstitutional insofar as it operates upon contracts made prior to its effective date.
Tex.—*Hutchings v. Slemons*, 141 Tex. 448, 174 S.W.2d 487, 148 A.L.R. 1320 (1943).
- 8 N.M.—*Pankey v. Hot Springs Nat. Bank*, 1939-NMSC-064, 44 N.M. 59, 97 P.2d 391 (1939).
- 9 Okla.—*State ex rel. Allen v. Board of Ed. of Independent School Dist. No. 74 of Muskogee County*, 1952 OK 241, 206 Okla. 699, 246 P.2d 368 (1952).
- Matters of substance**
A constitutional prohibition against the destruction of existing defenses after a suit had been commenced is applicable only to matters of substance and not to matters of form or remedial statutes.
Ala.—*State Bd. of Optometry v. Lee Optical Co. of Ala.*, 284 Ala. 562, 226 So. 2d 623 (1969).
- Special proceeding**
A proceeding before the board of adjustment for issuance of a permit to drill an oil well under a zoning ordinance was a "special proceeding" and not a "suit on any cause of action," and thus, a constitutional provision providing that the legislature should have no power to destroy any existing defense after a suit had been commenced on any cause of action did not apply.
Okla.—*In re Block 1, Only Heights Addition, Oklahoma City*, 1944 OK 213, 194 Okla. 221, 149 P.2d 265 (1944).
- 10 U.S.—*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).
Fla.—*Village of El Portal v. City of Miami Shores*, 362 So. 2d 275 (Fla. 1978).
Kan.—*Nitchals v. Williams*, 225 Kan. 285, 590 P.2d 582 (1979).
- 11 U.S.—*U. S. Wrestling Federation v. Wrestling Div. of the AAU, Inc.*, 545 F. Supp. 1053 (N.D. Ohio 1982), aff'd, 711 F.2d 1060 (6th Cir. 1983).
Ind.—*Slater v. Stoffel*, 140 Ind. App. 131, 221 N.E.2d 688 (1966).
- Liability for prior pollution**
N.J.—*State, Dept. of Environmental Protection v. Ventron Corp.*, 182 N.J. Super. 210, 440 A.2d 455 (App. Div. 1981), aff'd as modified on other grounds, 94 N.J. 473, 468 A.2d 150 (1983).
- Abatement of existing nuisance**
Tex.—*Skipper-Bivens Oil Co. v. State*, 115 S.W.2d 1016 (Tex. Civ. App. Austin 1938), writ refused.
- Judicial remedy for civil rights claim**
A statute, which had the effect of providing an alternative judicial remedy for vindication of alleged an discriminatory and unfair employment practice suffered by a former employee, could be applied to the former employee's claim against the former employer even though the former employee was discharged and filed a complaint with the employment commission prior to adoption of the statute.

Colo.—[Continental Title Co. v. District Court In and For City and County of Denver](#), 645 P.2d 1310 (Colo. 1982).

12 U.S.—[U.S. v. Resch](#), 85 F. Supp. 389 (W.D. Ky. 1949).

Change of tribunal

(1) The presumption against the application, in cases pending at the time of its enactment, of a statutory provision that would operate retroactively does not apply to jurisdiction-conferring or jurisdiction-stripping statutes, which usually do not take away any substantive right but simply change the tribunal that is to hear the case.

U.S.—[Hamdan v. Rumsfeld](#), 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).

(2) Generally, a change of tribunal, assuming the retention of court review, is a change of remedy, and while available procedures may make a difference in the result in litigation, such change is not considered a change in substantive rights and is taken as applicable to outstanding contracts or licenses.

U.S.—[Montana Power Co. v. Federal Power Commission](#), 445 F.2d 739 (D.C. Cir. 1970), opinion supplemented on other grounds, 459 F.2d 863 (D.C. Cir. 1972).

13 Mont.—[Castles v. State ex rel. Montana Dept. of Highways](#), 187 Mont. 356, 609 P.2d 1223 (1980).

14 Wis.—[Cliffs Chemical Co. v. Wisconsin Tax Commission](#), 193 Wis. 295, 214 N.W. 447 (1927).

15 Mich.—[Walz v. Dawson](#), 235 Mich. 344, 209 N.W. 177 (1926).

Moratorium

(1) A moratorium on mortgage foreclosures cannot be applied retrospectively for the purpose of setting aside a prior foreclosure sale.

N.Y.—[Railroad Co-op. Bldg. & Loan Ass'n v. Boston Bldg. Estates](#), 149 Misc. 349, 267 N.Y.S. 204 (Sup 1933).

(2) A moratorium law cannot be made applicable to a foreclosure suit after confirmation of the sale so as to grant the mortgagor an extension beyond the statutory period of redemption.

U.S.—[Phoenix Joint Stock Land Bank of Kansas City v. Dewey](#), 8 F. Supp. 678 (D. Kan. 1934).

16 U.S.—[U.S. v. Resch](#), 85 F. Supp. 389 (W.D. Ky. 1949).

17 U.S.—[U.S. v. Resch](#), 85 F. Supp. 389 (W.D. Ky. 1949).

Securing equitable right

Mich.—[Stott v. Stott Realty Co.](#), 288 Mich. 35, 284 N.W. 635 (1939).

18 N.Y.—[Jackson v. State](#), 261 N.Y. 134, 184 N.E. 735 (1933).

19 Colo.—[Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs](#), 948 P.2d 1002 (Colo. 1997), as modified on denial of reh'g, (Dec. 15, 1997).

Ill.—[Fourt v. De Lazzer](#), 348 Ill. App. 191, 108 N.E.2d 599 (4th Dist. 1952).

Saving clause

A statute repealing all laws providing for foreclosure of tax liens but providing that foreclosure actions begun prior to a specified date in the year of its enactment should be completed in conformity with the law in effect prior to such date was not unconstitutional as retrospective.

Kan.—[State ex rel. McDowell v. Holcomb](#), 154 Kan. 222, 117 P.2d 591 (1941).

20 U.S.—[Sampeyreac v. U.S.](#), 32 U.S. 222, 8 L. Ed. 665, 1833 WL 4211 (1833).

Colo.—[Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs](#), 948 P.2d 1002 (Colo. 1997), as modified on denial of reh'g, (Dec. 15, 1997).

Ohio—[State v. Cook](#), 83 Ohio St. 3d 404, 1998-Ohio-291, 700 N.E.2d 570 (1998).

21 U.S.—[Bronson v. Kinzie](#), 42 U.S. 311, 1 How. 311, 11 L. Ed. 143, 1843 WL 5971 (1843).

Tex.—[City of Tyler v. Likes](#), 962 S.W.2d 489 (Tex. 1997).

22 Tex.—[Harrison v. Cox](#), 524 S.W.2d 387 (Tex. Civ. App. Fort Worth 1975), writ refused n.r.e., (Oct. 1, 1975).

23 Conn.—[Massa v. Nastri](#), 125 Conn. 144, 3 A.2d 839, 120 A.L.R. 939 (1939).

16A C.J.S. Constitutional Law § 655

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

c. Laws Affecting Remedies or Procedure

§ 655. Altered statutes of limitation as constitutionally valid; preservation of reasonable time and opportunity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1578(2)

Statutes of limitation are generally regarded as remedial, and the legislature may establish or shorten an existing limitation period and apply it to preexisting causes of action.

In some jurisdictions, the constitution expressly provides that no statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage,¹ and thus, it would be unconstitutional to give retroactive effect to a shortened statute of limitations when to do so would bar a cause of action existing on the effective date of the statute.² However, statutes of limitation are generally regarded as remedial,³ and statutes limiting or shortening the time within which actions based on antecedent causes may be brought are valid⁴ provided a reasonable opportunity remains available for the assertion of such rights.⁵

Statutes extending such time are likewise valid,⁶ except where their effect would be to revive rights which have already become barred,⁷ either under the terms of a contract⁸ or by a statute that makes the limitation of time inhere in the right rather than in the remedy.⁹ However, there is also authority that the legislature may revive a claim which would have been barred by the previous limitation period by enacting a new statute of limitation without violating the constitutional prohibition against retroactive laws.¹⁰

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Footnotes

- 1 Fla.—[Lee v. Lang](#), 140 Fla. 782, 192 So. 490 (1939).
Claims against decedent's estate not affected
 Fla.—[In re Woods' Estate](#), 133 Fla. 730, 183 So. 10, 117 A.L.R. 1202 (1938).
- 2 D.C.—[Owens-Corning Fiberglas Corp. v. Henkel](#), 689 A.2d 1224 (D.C. 1997).
 Fla.—[In re Jelley's Estate](#), 360 So. 2d 1313 (Fla. 2d DCA 1978).
- 3 U.S.—[Doran v. Compton](#), 645 F.2d 440 (5th Cir. 1981).
 Colo.—[Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs](#), 948 P.2d 1002 (Colo. 1997), as modified on denial of reh'g, (Dec. 15, 1997).
 N.H.—[Maplevale Builders, LLC & a. v. Town of Danville](#), 165 N.H. 99, 70 A.3d 427 (2013).
- 4 D.C.—[Owens-Corning Fiberglas Corp. v. Henkel](#), 689 A.2d 1224 (D.C. 1997).
 Tex.—[City of Tyler v. Likes](#), 962 S.W.2d 489 (Tex. 1997).
Reduction in age of majority
 Ohio—[Ledwell v. May Co.](#), 54 Ohio Misc. 43, 7 Ohio Op. 3d 138, 8 Ohio Op. 3d 347, 377 N.E.2d 798 (C.P. 1977).
- 5 D.C.—[Owens-Corning Fiberglas Corp. v. Henkel](#), 689 A.2d 1224 (D.C. 1997).
 Tex.—[City of Tyler v. Likes](#), 962 S.W.2d 489 (Tex. 1997).
Redemption of property from tax sale
 Ga.—[Stith v. Morris](#), 241 Ga. 247, 244 S.E.2d 817 (1978).
Statute making judgments conclusive
 Ark.—[Day v. Johnston](#), 158 Ark. 478, 250 S.W. 532 (1923).
Change of rule of evidence
 A statute providing that certain mortgages should not be a lien after the prescribed period is not invalid as retroactive, although applicable to a prior mortgage, where the mortgagee has a specified time in which to renew his or her lien, since such statute is merely a change in rule of evidence.
 S.C.—[Boyd v. Boyd](#), 182 S.C. 498, 189 S.E. 794 (1937).
A.L.R. Library
[Validity, and Applicability to Causes of Action, of Statute Shortening Limitation Period or Period of Repose](#), 76 A.L.R.6th 31.
- 6 Me.—[Dobson v. Quinn Freight Lines, Inc.](#), 415 A.2d 814 (Me. 1980).
 N.H.—[State v. Preston](#), 119 N.H. 877, 409 A.2d 792 (1979).
Real property tax exemption
 A religious exemption application statute extending the time period within which religious organizations could apply for a real property tax exemption was not an unconstitutional retroactive law; the statute did not retroactively confer the exemption but rather extended the time for determining whether the exemption was warranted.
 Tex.—[Corpus Christi People's Baptist Church, Inc. v. Nueces County Appraisal Dist.](#), 904 S.W.2d 621 (Tex. 1995).
Redemption period
 The enactment of a statute retroactive in effect, extending the period for redeeming realty from a tax sale to include, along with the previous period from the date of the sale, the period up to execution of a tax deed, is valid.
 U.S.—[In re Argyle-Lake Shore Bldg. Corp.](#), 78 F.2d 491 (C.C.A. 7th Cir. 1935).
Tax collection proceedings

A retroactive statutory provision making extension of limitations on proceedings to collect a tax applicable to assessments made before the enactment thereof is not unconstitutional.

U.S.—[Pratt & Letchworth Co. v. U.S.](#), 1 F. Supp. 745 (W.D. N.Y. 1932).

U.S.—[William Danzer & Co. v. Gulf & S.I.R. Co.](#), 268 U.S. 633, 45 S. Ct. 612, 69 L. Ed. 1126 (1925).

Mo.—[Doe v. Roman Catholic Diocese of Jefferson City](#), 862 S.W.2d 338 (Mo. 1993).

Right to rely on defense as vesting only after limitations period has run

N.H.—[Maplevale Builders, LLC & a. v. Town of Danville](#), 165 N.H. 99, 70 A.3d 427 (2013).

Reason for rule

A statute extending a cause of action's limitations period cannot apply to revive a suit that would have been time-barred before the new statute of limitations took effect as such a statutory change would violate the constitutional prohibition on retroactive laws because it would impair vested, substantive rights and would impose a new obligation on the defendant that related to the defendant's past conduct.

Tex.—[In re A.D.](#), 73 S.W.3d 244 (Tex. 2002).

Assertion of claims against new party

A provision in the abandoned property law for payment of unclaimed insurance funds to the State which thereupon becomes responsible for established claims thereto, and making the statute enforceable notwithstanding the bar of any statute of limitations, does not unconstitutionally revive claims barred by the statute of limitations, by reason of its retrospective operation.

N.Y.—[Connecticut Mut. Life Ins. Co. v. Moore](#), 297 N.Y. 1, 74 N.E.2d 24 (1947), *aff'd in part*, 333 U.S. 541, 68 S. Ct. 682, 92 L. Ed. 863 (1948).

County protected by express prohibition

An act preventing a county from pleading limitations as a defense to a suit for delinquent tax fees is ineffective to bar the county from pleading limitation completed against a cause of action before passage of the act since to do so would be a violation of the prohibition against retrospective laws.

Tex.—[Fannin County v. Renshaw](#), 29 S.W.2d 476 (Tex. Civ. App. *Texarkana* 1930), writ dismissed, (Feb. 24, 1932).

Period extended after reduction

A claim not brought within the period allowed by a statute shortening the period of limitations cannot be revived by a subsequent statute extending the period.

Tex.—[Cathey v. Weaver](#), 193 S.W. 490 (Tex. Civ. App. *Austin* 1916), writ granted, (Jan. 15, 1919) and *aff'd*, 111 Tex. 515, 242 S.W. 447 (1922).

Mass.—[Mulligan v. Hilton](#), 305 Mass. 5, 24 N.E.2d 676, 133 A.L.R. 376 (1940).

Mass.—[Mulligan v. Hilton](#), 305 Mass. 5, 24 N.E.2d 676, 133 A.L.R. 376 (1940).

Ga.—[Vaughn v. Vulcan Materials Co.](#), 266 Ga. 163, 465 S.E.2d 661 (1996).

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16A C.J.S. Constitutional Law § 656

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

c. Laws Affecting Remedies or Procedure

§ 656. Retroactive statutes; particular matters of practice or procedure

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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A retroactive statute may validly apply to a wide range of matters of practice or procedure.

A retroactive statute may validly apply to such matters of practice or procedure as subject matter jurisdiction¹ venue,² process³ and personal jurisdiction,⁴ parties,⁵ and general or particular rules as to evidence in various actions.⁶ However, the legislature may not revive the court's jurisdiction over a case that has already been dismissed.⁷ Further examples of valid statutes which retroactively affect matters of practice include those relating to the verdict,⁸ judgment,⁹ measure of damages,¹⁰ costs,¹¹ and review.¹²

Statutes dealing with the recording of prior instruments will likewise be upheld¹³ provided reasonable time is given holders of such instruments to comply with such statutes.¹⁴

Recovery of attorney's fees.

While there is authority that statutes retroactively affecting the recovery of attorney's fees are valid as affecting merely a remedial right or a matter of practice,¹⁵ there is also authority that the recovery of attorney's fees is substantive and that statutes retroactively affecting attorney's fees are therefore invalid.¹⁶

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Footnotes

- 1 U.S.—*Ahmad v. Morgan Stanley & Co., Inc.*, 2 F. Supp. 3d 491 (S.D. N.Y. 2014).
Ohio—*State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829 (2002).
Tex.—*Butnaru v. Ford Motor Co.*, 84 S.W.3d 198 (Tex. 2002).
Change of tribunal
The presumption against the application, in cases pending at the time of its enactment, of a statutory provision that would operate retroactively does not apply to jurisdiction-conferring or jurisdiction-stripping statutes, which usually do not take away any substantive right but simply change the tribunal that is to hear the case.
U.S.—*Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).
- 2 Mo.—*State ex rel. LeNeve v. Moore*, 408 S.W.2d 47 (Mo. 1966).
N.C.—*Gardner v. Gardner*, 43 N.C. App. 678, 260 S.E.2d 116 (1979), decision aff'd, 300 N.C. 715, 268 S.E.2d 468 (1980).
- 3 La.—*McCoy v. Hunter*, 167 La. 1032, 120 So. 767 (1929).
- 4 U.S.—*Dotson v. Fluor Corp.*, 492 F. Supp. 313 (W.D. Tex. 1980).
Mont.—*State ex rel. Johnson v. District Court of Fourth Judicial Dist.*, 148 Mont. 22, 417 P.2d 109 (1966).
- 5 Ga.—*Fite v. Henson*, 157 Ga. 679, 122 S.E. 412 (1924).
Derivative actions
Kan.—*Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).
Authority to sue
Congress has remedial power to ratify and approve prosecution of pending suits by one governmental agency which were brought without prior authorization of another agency which had been previously required.
U.S.—*Bowles v. Strickland*, 151 F.2d 419 (C.C.A. 5th Cir. 1945).
- 6 N.C.—*Spencer v. McDowell Motor Co.*, 236 N.C. 239, 72 S.E.2d 598 (1952).
Rebuttable presumption
Ill.—*First Nat. Bank of Chicago v. King*, 165 Ill. 2d 533, 209 Ill. Dec. 199, 651 N.E.2d 127 (1995).
Tenn.—*Brewer v. Aetna Life Ins. Co.*, 490 S.W.2d 506 (Tenn. 1973).
Evidence determining alimony
Ga.—*Davidson v. Davidson*, 243 Ga. 848, 257 S.E.2d 269 (1979).
- 7 Mass.—*Santiago v. Com.*, 428 Mass. 39, 697 N.E.2d 979 (1998).
- 8 **Number of jurors in agreement**
N.J.—*Morin v. Becker*, 6 N.J. 457, 79 A.2d 29 (1951).
- 9 Ill.—*Mather v. Parkhurst*, 302 Ill. 236, 134 N.E. 91 (1922).
Enforcement
Tex.—*Harrison v. Cox*, 524 S.W.2d 387 (Tex. Civ. App. Fort Worth 1975), writ refused n.r.e., (Oct. 1, 1975).
Power to revoke or modify
Ohio—*Pengelly v. Thomas*, 79 Ohio App. 53, 34 Ohio Op. 449, 46 Ohio L. Abs. 481, 65 N.E.2d 897 (2d Dist. Franklin County 1946).
- 10 Ariz.—*Jimenez v. Sears, Roebuck and Co.*, 183 Ariz. 399, 904 P.2d 861 (1995).
Cal.—*Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (4th Dist. 1971).
Precluding inclusion of interest
U.S.—*Standard Oil Co. of California v. U.S.*, 107 F.2d 402 (C.C.A. 9th Cir. 1939).
- 11 U.S.—*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).
- 12 Ohio—*Morgan v. Western Elec. Co., Inc.*, 69 Ohio St. 2d 278, 23 Ohio Op. 3d 271, 432 N.E.2d 157 (1982).
Standard of review

Cal.—[Anton v. San Antonio Community Hospital](#), 132 Cal. App. 3d 638, 183 Cal. Rptr. 423 (4th Dist. 1982).

Posting bonds on appeal in possessory action

N.H.—[Smith v. Sampson](#), 114 N.H. 638, 325 A.2d 796 (1974).

13 Iowa—[Presbytery of Southeast Iowa v. Harris](#), 226 N.W.2d 232 (Iowa 1975).

14 Pa.—[Farmers Nat. Bank & Trust Co. of Reading, to Use of Adams v. Berks County Real Estate Co.](#), 333 Pa. 390, 5 A.2d 94, 121 A.L.R. 905 (1939).

15 Colo.—[Kuhn v. State](#), 924 P.2d 1053 (Colo. 1996).

Kan.—[Nitchals v. Williams](#), 225 Kan. 285, 590 P.2d 582 (1979).

Fee award as quasijudicial act

Colo.—[Lake Durango Water Co., Inc. v. Public Utilities Com'n of State of Colorado](#), 67 P.3d 12 (Colo. 2003), as modified on denial of reh'g, (Apr. 28, 2003).

16 Fla.—[Parrish v. Mullis](#), 458 So. 2d 401 (Fla. 1st DCA 1984).

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16A C.J.S. Constitutional Law § 657

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation**VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder****A. Retroactive or Retrospective Laws****2. Validity as Affected by Constitutional Prohibition****d. Laws Affecting Taxation****§ 657. Retroactivity of laws affecting taxation; validity**
[Topic Summary](#) | [References](#) | [Correlation Table](#)
West's Key Number DigestWest's Key Number Digest, [Statutes](#)  [1585](#)

The mere retroactivity of a statute affecting taxation does not render it unconstitutional, and such a statute is valid if it is not arbitrary and does not disturb vested rights, impair contractual obligations, or violate due process.

As a general rule, the mere retroactivity of a statute affecting taxation does not render it unconstitutional.¹ The question turns on the balancing of equities² by looking to see if there are any potentially harsh effects of applying the law retroactively to a taxpayer.³ In each case, it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress constitutional limitations.⁴

Thus, a retroactive tax measure is generally enforceable if it does not result in impairment of the obligations of a contract or interference with vested rights⁵ and does not, in its application, take property arbitrarily⁶ or in disregard of due process⁷ or annul or interfere with judgments theretofore rendered.⁸ There is even authority that retroactive tax laws may be valid although they impair vested rights.⁹ An exemption from taxation may be granted retroactively.¹⁰

Accordingly, a tax based on a prior assessment is valid¹¹ as is one which imposes an additional franchise tax after the payment of the amount fixed by the prior law¹² or which increases a franchise tax for the current year by changing the method of computing the income of the preceding year on which the tax is based.¹³ However, a statute which establishes corporate income as an alternative basis for computing a franchise tax, based on income for the prior year, is invalid.¹⁴ A sales tax act is valid which applies retrospectively to the proceeds of sales received before its effective date.¹⁵ Also, a statute is valid which retroactively corrects inequalities resulting from a particular manner of taxation,¹⁶ imposes a tax to pay a prior indebtedness,¹⁷ changes the basis of an assessment already made,¹⁸ regulates the disposition of tax funds,¹⁹ or, prior to the taxing date, increases the tax on property.²⁰

The rule has been laid down and followed by some authorities that a use tax statute may be retroactive to prior, but recent, transactions and that a statute which reaches back beyond this limit of permissible retroactivity is invalid.²¹ A change may be made in the law during a current tax year of the amount of excise²² or business profits²³ tax, payable that year, so as to make it effective even retroactively, for the entire year, and conversely, an act passed during a current fiscal year prohibiting political subdivisions from levying any tax on certain businesses may apply to taxes due and payable for the entire year.²⁴

Likewise, property subject to taxation may be taxed as of a date prior to the passage of the statute,²⁵ provided such retroactive operation does not extend back for more than a reasonable period,²⁶ but the legislature cannot impose retroactive taxation on a class of property as of a time when it was not subject to taxation²⁷ or impose a fee, purporting to be an entrance fee, on corporations entering the state to do business therein, on a corporation which had entered the state and engaged in local and interstate business before any such fee was required.²⁸

Under a constitutional provision to such effect, a retroactive statute imposing a tax on a prior act is invalid,²⁹ but in the absence of a constitutional restriction, a taxable event may be one which has occurred before the law levying the tax was enacted.³⁰ Thus, a statute levying taxes for the current year may be made applicable to transactions occurring before its passage,³¹ and a license tax for the whole of a current year may be validly imposed during such year on any person thereafter entering a certain business within the year.³²

However, there is authority that where the constitution expressly prohibits retroactive laws, a taxing body cannot lawfully levy taxes for preceding years,³³ or for a portion of the current year prior to the taking effect of the taxing statute,³⁴ although the latter rule has not been applied to an unemployment compensation act levying a tax for the part of the current year prior to the effective date.³⁵ Likewise, where the constitution expressly prohibits retroactive laws, a taxing body cannot lawfully provide for reassessment for previous improvements.³⁶

While there is authority holding that an unemployment compensation statute attempting to subject an employing unit to a tax on a status existing prior to the enactment of the statute is violative of a constitutional prohibition against retrospective legislation,³⁷ a substantially similar statute in another state has been held not unconstitutionally retroactive³⁸ except insofar as it attempted to impose the tax based on such status to a time prior to the effective date of the statute.³⁹ A legislature has no power to recreate liability for taxes barred by a limitation statute extinguishing the liability.⁴⁰

CUMULATIVE SUPPLEMENT

Cases:

Under the test for establishing a cognizable self-censorship injury, so as to have standing on a vagueness challenge to a law, it is the existence, not the imposition, of standardless requirements that causes the injury. [U.S.C.A. Const.Amend. 1. Wollschlaeger v. Governor of Florida, 797 F.3d 859 \(11th Cir. 2015\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1

[U.S.—Welch v. Henry, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87, 118 A.L.R. 1142 \(1938\).](#)
[N.H.—Kennett's Estate v. State, 115 N.H. 50, 333 A.2d 452 \(1975\).](#)
[Vt.—Pabst v. Commissioner of Taxes, 136 Vt. 126, 388 A.2d 1181 \(1978\).](#)
Legislative authority to impose retroactive tax beyond question
[Ala.—Jefferson County Com'n v. Edwards, 49 So. 3d 685 \(Ala. 2010\).](#)
Short period
 Retroactivity of a tax statute, for a short period, is generally permitted.
[N.Y.—Varrington Corp. v. City of New York Dept. of Finance, 85 N.Y.2d 28, 623 N.Y.S.2d 534, 647 N.E.2d 746 \(1995\).](#)
- 2

[N.Y.—James Square Associates LP v. Mullen, 91 A.D.3d 164, 933 N.Y.S.2d 485 \(4th Dep't 2011\), order aff'd, 21 N.Y.3d 233, 970 N.Y.S.2d 888, 993 N.E.2d 374 \(2013\).](#)
- 3

[N.Y.—Varrington Corp. v. City of New York Dept. of Finance, 85 N.Y.2d 28, 623 N.Y.S.2d 534, 647 N.E.2d 746 \(1995\).](#)
- 4

[U.S.—Welch v. Henry, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87, 118 A.L.R. 1142 \(1938\); Hospital Data Center of S. C., Inc. v. U. S., 225 Ct. Cl. 158, 634 F.2d 541 \(1980\).](#)
[Iowa—General Expressways, Inc. v. Iowa Reciprocity Bd., 163 N.W.2d 413 \(Iowa 1968\).](#)
Need of government as test
[U.S.—Combs v. U.S., 98 F. Supp. 749 \(D. Vt. 1951\).](#)
Replacement tax
[Ill.—Continental Illinois Nat. Bank and Trust Co. of Chicago v. Zagel, 78 Ill. 2d 387, 36 Ill. Dec. 650, 401 N.E.2d 491 \(1979\).](#)
Judicial review
 A tax law authorizing a city to obtain judicial review of determinations of the state tax commission was unconstitutional, absent any showing of public interest to be served by retroactivity, insofar as applied to determinations which were otherwise unreviewable on the day the amendment was enacted.
[N.Y.—Chrysler Properties, Inc. v. Morris, 23 N.Y.2d 515, 297 N.Y.S.2d 723, 245 N.E.2d 395 \(1969\).](#)
- 5

[Ohio—State ex rel. Lewis v. Scioto-Sandusky Conservancy Dist., 160 Ohio St. 155, 51 Ohio Op. 83, 113 N.E.2d 633 \(1953\).](#)
[Tenn.—Penn-Dixie Cement Corp. v. Kizer, 194 Tenn. 412, 250 S.W.2d 904 \(1952\).](#)
Definitions used to arrive at tax liability
 Until a tax liability is fixed as a sum certain, definitions used to arrive at that liability are subject to change by the legislature without violating the constitutional bar on retrospective application of laws.
[Mo.—Beatty v. State Tax Com'n, 912 S.W.2d 492 \(Mo. 1995\).](#)
Land use change tax
 A statute which permits a town to assess the land use change tax on a lot-by-lot basis was not a retrospective law and, thus, was constitutional as applied to land that was placed in current use prior to the statute but developed into a subdivision after the statute; the relevant transaction for taxing the land at fair market value was removal from current use as open space, and the landowner had no vested right in a particular method of land use change taxation.
[N.H.—Tyler Road Development Corp. v. Town of Londonderry, 145 N.H. 615, 766 A.2d 267 \(2000\).](#)
Refund filing period

While the application to corporate taxpayers of a statutory requirement that applications for a refund of franchise taxes be filed within the prescribed period from the date of the claimed erroneous payment decreased taxpayers' refund filing period, such application to taxpayers, whose claim of overpayment stemmed from a tax obligation that was calculable before but not payable until after the effective date of the refund filing provision, was not retroactive application in derogation of the constitution.

Ohio—*Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St. 2d 1, 8 Ohio Op. 3d 1, 10 Ohio Op. 3d 254, 374 N.E.2d 400 (1978).

6 Okla.—*Sheehan v. Oklahoma Tax Commission*, 1977 OK 112, 565 P.2d 370 (Okla. 1977).

Tenn.—*Penn-Dixie Cement Corp. v. Kizer*, 194 Tenn. 412, 250 S.W.2d 904 (1952).

Mere retroactivity not arbitrary

A tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied.

U.S.—*Milliken v. U.S.*, 283 U.S. 15, 51 S. Ct. 324, 75 L. Ed. 809 (1931).

Curative law

(1) A tax law which retroactively cures an administrative defect or retroactively cures a patent error is not invalid as arbitrary.

N.Y.—*People ex rel. Best & Co. v. Graves*, 265 N.Y. 431, 193 N.E. 259 (1934).

(2) If the State has power to impose a tax in the first instance, it has power by retroactive legislation to cure defects.

Md.—*Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 313 A.2d 829 (1974).

7 Iowa—*General Expressways, Inc. v. Iowa Reciprocity Bd.*, 163 N.W.2d 413 (Iowa 1968).

Tenn.—*Penn-Dixie Cement Corp. v. Kizer*, 194 Tenn. 412, 250 S.W.2d 904 (1952).

8 N.C.—*Piedmont Memorial Hospital v. Guilford County*, 221 N.C. 308, 20 S.E.2d 332 (1942).

9 Conn.—*Parlato v. McCarthy*, 136 Conn. 126, 69 A.2d 648 (1949).

10 Md.—*Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 313 A.2d 829 (1974).

11 U.S.—*Locke v. City of New Orleans*, 71 U.S. 172, 18 L. Ed. 334, 1866 WL 9462 (1866).

Mo.—*State ex rel. Ross, to Use of Drainage District No. 8 of Pemiscot County v. General American Life Ins. Co.*, 336 Mo. 829, 85 S.W.2d 68 (1935).

12 Tex.—*Calvert v. Texaco Inc.*, 476 S.W.2d 897 (Tex. Civ. App. Austin 1972), writ refused n.r.e., (May 3, 1972).

13 Cal.—*Filoli, Inc., v. Johnson*, 4 Cal. 2d 662, 51 P.2d 1093 (1935).

14 Ohio—*Buckeye Potato Chip Co., Inc. v. Kosydar*, 45 Ohio St. 2d 270, 74 Ohio Op. 2d 427, 344 N.E.2d 137 (1976).

15 Cal.—*Roth Drugs v. Johnson*, 13 Cal. App. 2d 720, 57 P.2d 1022 (3d Dist. 1936).

16 Md.—*Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 313 A.2d 829 (1974).

17 Mich.—*Hazel Park Nonpartisan Taxpayers Ass'n v. Royal Oak Tp.*, 317 Mich. 607, 27 N.W.2d 249 (1947).

Liability of new inhabitants

The inhabitants of territory annexed to a municipal corporation may be taxed for payment of debts previously contracted by the municipality.

Ga.—*White v. City of Atlanta*, 134 Ga. 532, 68 S.E. 103 (1910).

18 Ky.—*Durrett v. Davidson*, 122 Ky. 851, 29 Ky. L. Rptr. 401, 93 S.W. 25 (1906).

19 N.Y.—*Town of Irondequoit v. Monroe County*, 158 Misc. 123, 286 N.Y.S. 533 (Sup 1935), order aff'd, 254 A.D. 933, 6 N.Y.S.2d 650 (4th Dep't 1938).

20 N.Y.—*People ex rel. 347 West Thirty-Sixth St. Corp. v. Goldfogle*, 137 Misc. 62, 241 N.Y.S. 391 (Sup 1930), aff'd, 229 A.D. 852, 243 N.Y.S. 808 (1st Dep't 1930), aff'd, 255 N.Y. 571, 175 N.E. 318 (1930).

21 Wash.—*Northern Pac. Ry. Co. v. Henneford*, 9 Wash. 2d 18, 113 P.2d 545 (1941).

Modesty of retroactive period

The modesty of the retroactive period to remedy an unconstitutional tax law must be assessed under the facts and circumstances of each case.

Cal.—*River Garden Retirement Home v. Franchise Tax Bd.*, 186 Cal. App. 4th 922, 113 Cal. Rptr. 3d 62 (1st Dist. 2010).

Not the distant past

Legislation imposing, for two years, a daily surcharge on state-licensed riverboat casinos with adjusted gross receipts of over \$200 million in the calendar year preceding the legislation, the proceeds of which surcharge

were to be distributed to horse racing tracks in the state, was not unconstitutionally retroactive; the surcharge did not reach back to the distant past and was of a very limited duration, and the surcharge was related to the injury that casinos had caused to the horse racing industry.

Ill.—*Empress Casino Joliet Corp. v. Giannoulis*, 231 Ill. 2d 62, 324 Ill. Dec. 491, 896 N.E.2d 277 (2008).

Ala.—*Department of Indus. Relations v. West Boylston Mfg. Co.*, 253 Ala. 67, 42 So. 2d 787 (1949).

N.H.—*Kennett's Estate v. State*, 115 N.H. 50, 333 A.2d 452 (1975).

W. Va.—*City of Huntington v. Chesapeake & Potomac Tel. Co.*, 154 W. Va. 634, 177 S.E.2d 591 (1970).

Ohio—*State ex rel. Lewis v. Scioto-Sandusky Conservancy Dist.*, 160 Ohio St. 155, 51 Ohio Op. 83, 113 N.E.2d 633 (1953).

Mass.—*Merchants Nat. Bank of Boston v. Merchants Nat. Bank of Boston*, 318 Mass. 563, 62 N.E.2d 831 (1945).

U.S.—*First Nat. Bank v. City of Covington*, 103 F. 523 (C.C.D. Ky. 1900).

Intangible personal property tax

Under an act, which provided an assessment should be based on earnings the year prior to the assessment, assessments made in a later year on income received in an earlier year from deposits of life policies proceeds were in violation of the constitutional prohibition against retrospective operation of laws.

Mo.—*In re Armistead*, 362 Mo. 960, 245 S.W.2d 145 (1952).

Intangibles outside state

The legislature was without power to tax intangibles which were owned by a foreign corporation and located outside the state, which intangibles reflect past earnings or income derived from operations in the state withdrawn from the State's jurisdiction and which had become permanently located outside of the state at time when the State had not adopted any law making such acquired assets subject to any such tax.

Mich.—*Cleveland-Cliffs Iron Co. v. State of Mich., Dept. of Revenue*, 329 Mich. 225, 45 N.W.2d 46 (1950).

Assessment for past improvements

The legislature may not subject to assessment, for past improvements, property which was not subject to such assessment at the time the improvements were made.

Ga.—*Holliday v. City of Atlanta*, 96 Ga. 377, 23 S.E. 406 (1895).

Nev.—*State ex rel. Texas Co. v. Koontz*, 69 Nev. 25, 240 P.2d 525 (1952).

Prior employment

An unemployment compensation act, requiring contributions by employers to unemployment compensation fund "in respect to employment," imposes taxes on acts of contracting for employment and paying wages and hence is unconstitutional and void as retroactive so far as it requires payment of contributions in respect to employment for period before ratification.

N.C.—*Unemployment Compensation Commission of North Carolina v. Wachovia Bank & Trust Co.*, 215 N.C. 491, 2 S.E.2d 592 (1939).

Ala.—*Department of Indus. Relations v. West Boylston Mfg. Co.*, 253 Ala. 67, 42 So. 2d 787 (1949).

Cigarette tax

Tex.—*Daywood v. Calvert*, 478 S.W.2d 152 (Tex. Civ. App. Austin 1972), writ refused n.r.e., (July 19, 1972).

Cal.—*Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes*, 73 Cal. App. 3d 486, 141 Cal. Rptr. 36 (2d Dist. 1977).

Fla.—*State ex rel. Jacksonville Gas Co. v. Lee*, 112 Fla. 109, 150 So. 225 (1933).

A.L.R. Library

Validity of state or municipal tax or license fee upon occupation of practicing law, 50 A.L.R.4th 467, §§ 70, 71.

Tex.—*Broocks v. State*, 41 S.W.2d 714 (Tex. Civ. App. Beaumont 1931).

Tex.—*State v. Galveston, H. & S.A. Ry. Co.*, 100 Tex. 153, 97 S.W. 71 (1906), rev'd on other grounds, 210 U.S. 217, 28 S. Ct. 638, 52 L. Ed. 1031 (1908).

Tex.—*Friedman v. American Sur. Co. of New York*, 137 Tex. 149, 151 S.W.2d 570 (1941).

Mo.—*Gast Realty & Investment Co. v. Schneider*, 296 Mo. 687, 246 S.W. 177 (1922).

Mo.—*Murphy v. Limpp*, 347 Mo. 249, 147 S.W.2d 420 (1940).

Determination based on predecessor's status

The determination of the rate for contributions to an unemployment compensation fund by a successor employing unit on the basis of the predecessor's employment experience is not unconstitutional as being

retroactive as applied to contributions due after the effective date of the statute fixing the rate although the rate is computed on the basis of employment experience before such date.

Mo.—[Bucklin Coal Mining Co. v. Unemployment Compensation Com'n](#), 356 Mo. 313, 201 S.W.2d 463 (1947).

38 Wash.—[Bates v. McLeod](#), 11 Wash. 2d 648, 120 P.2d 472 (1941).

39 Wash.—[Bates v. McLeod](#), 11 Wash. 2d 648, 120 P.2d 472 (1941).

40 U.S.—[Pepsin Syrup Co. v. Schwaner](#), 35 F.2d 197 (S.D. Ill. 1929).

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16A C.J.S. Constitutional Law § 658

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

d. Laws Affecting Taxation

§ 658. Collection of back taxes not impermissible retroactivity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1585

Neglect of administrative officials, misunderstanding of the law, or lack of adequate machinery is not a constitutional barrier to a state reaching backward for taxes, and a legislature may provide for the collection of back taxes.

Neglect of administrative officials, misunderstanding of the law, or lack of adequate machinery has never been a constitutional barrier to a state reaching backward for taxes.¹ Accordingly, a legislature may provide for the collection of back taxes or taxes on omitted property.² However, statutes imposing penalties on the owners for prior delinquencies as to such property have been declared void,³ and a personal liability for a past assessment cannot be imposed where there was no such liability at the time the assessment was made.⁴

A legislature may constitutionally adopt new remedies for the collection of taxes already delinquent⁵ or may impose a different or additional penalty for past delinquencies.⁶ Likewise, the legislature may reduce the period of delinquency required before the property may be sold for nonpayment⁷ or make retroactive changes in the method of disposing of property acquired by the

State because of nonpayment of taxes.⁸ A statute which amounts to no more than a recomputation of taxes payable under a statute existent throughout the period to which the new statute is retroactively applied is not invalid.⁹ However, a statute is void if it imposes more onerous conditions on the redemption of land from tax sales which have been already made.¹⁰

The State, in the absence of an express constitutional prohibition against retrospective laws generally, is empowered to waive any vested rights it has acquired in interest on delinquent taxes¹¹ or in title to land purchased by it at a tax sale.¹² It may also waive a penalty required to be paid as a condition of redemption¹³ and may direct the remission of taxes which have been levied¹⁴ or require the refunding of overpayments of taxes made in the past.¹⁵

On the other hand, although there is authority to the contrary,¹⁶ under an express constitutional prohibition against retrospective laws generally, a legislature cannot ordinarily extinguish an accrued liability for taxes.¹⁷ However, penalties, interest, and costs in connection with the collection of back taxes may be waived, despite such a prohibition,¹⁸ except where penalties are deemed to be part of the tax due rather than an obligation apart therefrom.¹⁹

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Footnotes

- 1 U.S.—*Illinois Cent. R. Co. v. State of Minn.*, 309 U.S. 157, 60 S. Ct. 419, 84 L. Ed. 670 (1940).
- 2 U.S.—*Illinois Cent. R. Co. v. State of Minn.*, 309 U.S. 157, 60 S. Ct. 419, 84 L. Ed. 670 (1940); *Florida Cent. & P.R. Co. v. Reynolds*, 183 U.S. 471, 22 S. Ct. 176, 46 L. Ed. 283 (1902); *Winona & St. P. Land Co. v. State of Minnesota*, 159 U.S. 526, 16 S. Ct. 83, 40 L. Ed. 247 (1895).
- 3 Okla.—*Anderson v. Ritterbusch*, 1908 OK 250, 22 Okla. 761, 98 P. 1002 (1908).
- 4 Mich.—*Weber v. City of Detroit*, 158 Mich. 149, 122 N.W. 570 (1909).
- Successor as occupying position of predecessor**
An assessment for delinquent contributions to an unemployment compensation fund due from a predecessor employing unit against its successor is not unconstitutional as being retroactive and impairing the obligation of contracts since for purposes of unemployment compensation law, a successor employing unit occupies the position of its predecessor.
Mo.—*Bucklin Coal Mining Co. v. Unemployment Compensation Com'n*, 356 Mo. 313, 201 S.W.2d 463 (1947).
- 5 Tenn.—*State v. Bone*, 185 Tenn. 78, 203 S.W.2d 362 (1947).
Deposit of taxes due
A statute requiring the deposit of taxes due in a suit to enjoin the issuance of a tax deed is merely a procedural change and does not violate the constitutional prohibition against retrospective legislation.
Mont.—*State v. District Court of Thirteenth Judicial Dist. in and for Carbon County*, 92 Mont. 272, 12 P.2d 852 (1932).
Appointment of receiver
A statute providing for the appointment of a receiver to collect rents on real property subject to unpaid taxes or special assessments which have been due or payable for a specified period is not unconstitutional as retroactive.
N.Y.—*In re Section 14, Block 4367, Lot 1, Borough of Brooklyn, City of New York*, 117 N.Y.S.2d 36 (Sup 1952).
- 6 U.S.—*League v. State of Tex.*, 184 U.S. 156, 22 S. Ct. 475, 46 L. Ed. 478 (1902).
- 7 Cal.—*Gartner v. Roth*, 26 Cal. 2d 184, 157 P.2d 361 (1945).
- 8 Cal.—*Gartner v. Roth*, 26 Cal. 2d 184, 157 P.2d 361 (1945).
- 9 U.S.—*Illinois Cent. R. Co. v. State of Minn.*, 309 U.S. 157, 60 S. Ct. 419, 84 L. Ed. 670 (1940).
- 10 Cal.—*Johnson v. Taylor*, 150 Cal. 201, 88 P. 903 (1907).
- 11 **Reduction of interest**
The legislature may retroactively reduce the interest rate on delinquent taxes.

Wash.—*Henry v. McKay*, 164 Wash. 526, 3 P.2d 145, 77 A.L.R. 1025 (1931).

Cal.—*Anglo California Nat. Bank of San Francisco v. Leland*, 9 Cal. 2d 347, 70 P.2d 937 (1937).

Mont.—*State ex rel. Sparling v. Hitsman*, 99 Mont. 521, 44 P.2d 747 (1935).

Ohio—*Voinovich v. Board of Park Commrs. of Cleveland Metropolitan Park Dist.*, 42 Ohio St. 2d 511, 71 Ohio Op. 2d 506, 330 N.E.2d 434 (1975).

Pa.—*Longacre Park Heating Co. v. Delaware County*, 160 Pa. Super. 252, 50 A.2d 706 (1947).

Tenn.—*Bank of Commerce & Trust Co. v. McLemore*, 162 Tenn. 137, 35 S.W.2d 31 (1931).

Mo.—*Graham Paper Co. v. Gehner*, 332 Mo. 155, 59 S.W.2d 49 (1933).

Assessments not final

Ohio—*Gulf Refining Co. v. Evatt*, 148 Ohio St. 228, 35 Ohio Op. 216, 74 N.E.2d 351 (1947).

Property used for public purposes

A statute providing, in substance, that where the State or political subdivision has acquired real property prior to a particular date and it is being used for public purposes, but has not been placed on the tax exempt list, the State or subdivision may file for an exemption from and remission of delinquent taxes, penalties, and interest constituted retroactive legislation.

Ohio—*Perk v. City of Euclid*, 17 Ohio St. 2d 4, 46 Ohio Op. 2d 60, 244 N.E.2d 475 (1969).

Unemployment compensation contribution

A statute could not release any unemployment compensation contributions which accrued before its passage.

Tex.—*Rowan Oil Co. v. Texas Employment Commission*, 152 Tex. 607, 263 S.W.2d 140 (1953).

Omitted taxes

A statute authorizing issuance of a certificate of immunity for collection of omitted taxes on intangible personal property for years prior to the particular year to taxpayers applying therefor who in good faith have made full and complete returns for such year is not violative of the constitutional prohibition against retrospective laws.

Ohio—*State ex rel. Hodapp v. Haines*, 78 Ohio App. 339, 34 Ohio Op. 63, 45 Ohio L. Abs. 506, 64 N.E.2d 330 (2d Dist. Montgomery County 1945).

Neb.—*Mooney v. Drainage Dist. No. 1 of Richardson County*, 134 Neb. 192, 278 N.W. 368 (1938).

Attorney's fees

An attorney's right to fees for services rendered in suits to recover delinquent drainage taxes was not a vested right so as to preclude the legislature from passing a statute providing that the remission of penalties, interest, and costs accrued on delinquent taxes shall be in full if the taxes are paid not later than the specified date.

Mo.—*Pate v. Drainage Dist. No. 6 of Pemiscot County*, 162 S.W.2d 88 (Mo. Ct. App. 1942).

Ohio—*State ex rel. Crotty v. Zangerle*, 133 Ohio St. 532, 11 Ohio Op. 226, 14 N.E.2d 932 (1938).

16A C.J.S. Constitutional Law § 659

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

d. Laws Affecting Taxation

§ 659. Income tax laws as retrospective; prospective change to tax rate

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1585

An income tax law is generally not unconstitutional because retrospective, and it may validly apply to the year in which enacted, or to prior, but recent, transactions, but under an express constitutional prohibition against retrospective laws, a statute cannot change the rate of tax payable for a period prior to its effective date.

Generally, an income tax law is not unconstitutional merely because of its retrospective operation,¹ especially where such laws only affect deductions that may be taken from income, which are matters of legislative favor.² Moreover, some provisions in almost every income tax statute are retroactive for reasonable periods.³

An income tax law may validly apply to the period during which it was in the process of enactment,⁴ or to the year in which it was enacted,⁵ or to the income accruing during such year from transactions initiated prior thereto,⁶ or to the year of the legislative session immediately preceding that of its enactment,⁷ or to prior, but recent, transactions.⁸ Furthermore, the application in one

year of a tax statute to payments under installment agreements which were completed in a prior year is not unconstitutional on the theory the taxation of these payments is a tax upon a gain from a prior sale.⁹

However, under an express prohibition against retrospective laws, while an income tax statute, applicable to the elapsed period of the year in which enacted, is valid insofar as it carries forward the provisions of the prior law,¹⁰ or provides that the base for the annual tax shall be determined as of a prior date,¹¹ such a statute cannot increase¹² or decrease¹³ the rate of tax payable for a period prior to its going into effect. Under a state constitutional provision prohibiting retrospective laws taxing "sales, purchases, or other acts previously done," the earning of income is an "other act"; however, a statute temporarily raising the highest income tax rate, enacted in September of the taxable year and effective on the first day of the taxable year, does not impermissibly tax "acts previously done" where state taxable income is calculated on the basis of the taxable year, and taxable income and ultimate tax liability or overpayment are indeterminate until the close of the taxable year such that the taxpayers' taxable income is not fixed at the date of enactment.¹⁴

A law is not illegally retroactive because it taxes to the grantor the future income of a revocable trust created in the past.¹⁵

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Footnotes

- 1 U.S.—*U.S. v. Hudson*, 299 U.S. 498, 57 S. Ct. 309, 81 L. Ed. 370 (1937).
Md.—*Katzenberg v. Comptroller of Treasury*, 263 Md. 189, 282 A.2d 465 (1971).
Undistributed profits tax
U.S.—*Helvering v. National Grocery Co.*, 304 U.S. 282, 58 S. Ct. 932, 82 L. Ed. 1346 (1938).
Amendment making limiting applicability of tax credit
Ariz.—*Watts v. Arizona Dept. of Revenue*, 221 Ariz. 97, 210 P.3d 1268 (Ct. App. Div. 1 2009).
Prohibition of laws favoring named classes
A constitutional prohibition of any retrospective law in favor of a railroad, corporation, individual, or association of individuals does not apply to income tax laws.
Mont.—*Mills v. State Board of Equalization*, 97 Mont. 13, 33 P.2d 563 (1934).
- 2 U.S.—*Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 76 F.2d 892 (C.C.A. 2d Cir. 1935), *aff'd*, 297 U.S. 129, 56 S. Ct. 397, 80 L. Ed. 528 (1936).
- 3 U.S.—*U.S. v. Hudson*, 299 U.S. 498, 57 S. Ct. 309, 81 L. Ed. 370 (1937).
- 4 U.S.—*U.S. v. Hudson*, 299 U.S. 498, 57 S. Ct. 309, 81 L. Ed. 370 (1937).
- 5 U.S.—*U.S. v. Hudson*, 299 U.S. 498, 57 S. Ct. 309, 81 L. Ed. 370 (1937); *Lynch v. Hornby*, 247 U.S. 339, 38 S. Ct. 543, 62 L. Ed. 1149 (1918); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 36 S. Ct. 236, 60 L. Ed. 493 (1916).
- 6 Cal.—*Holmes v. McColgan*, 17 Cal. 2d 426, 110 P.2d 428 (1941).
- 7 Pa.—*Com. v. Budd Co.*, 379 Pa. 159, 108 A.2d 563 (1954).
- 8 U.S.—*Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87, 118 A.L.R. 1142 (1938); *Cooper v. U.S.*, 280 U.S. 409, 50 S. Ct. 164, 74 L. Ed. 516 (1930).
Wash.—*Imperial Drum & Bugle Corps, Inc. v. City of Seattle*, 14 Wash. App. 845, 545 P.2d 1235 (Div. 1 1976).
- 9 Md.—*Marco Associates, Inc. v. Comptroller of Treasury*, 265 Md. 669, 291 A.2d 489 (1972).
- 10 Mo.—*Stouffer v. Crawford*, 248 S.W. 581 (Mo. 1923).
- 11 Mo.—*Stouffer v. Crawford*, 248 S.W. 581 (Mo. 1923).
- 12 Mo.—*Smith v. Dirckx*, 283 Mo. 188, 223 S.W. 104, 11 A.L.R. 510 (1920).
- 13 Mo.—*State ex rel. and to Use of Kolen v. Southwestern Bell Telephone Co.*, 316 Mo. 1008, 292 S.W. 1037 (1927).
- 14 N.C.—*Coley v. State*, 360 N.C. 493, 631 S.E.2d 121 (2006).
- 15 U.S.—*Reinecke v. Smith*, 289 U.S. 172, 53 S. Ct. 570, 77 L. Ed. 1109 (1933).

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16A C.J.S. Constitutional Law § 660

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

A. Retroactive or Retrospective Laws

2. Validity as Affected by Constitutional Prohibition

d. Laws Affecting Taxation

§ 660. Transfer and estate tax statutes and retroactivity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1585

Although a gift tax law cannot constitutionally be made applicable to a completed gift made prior to its enactment, taxes may be imposed on transfers resulting from acts done, or relationships entered into, prior to the passage of the taxing statute.

A gift tax law cannot constitutionally be made applicable to a completed gift made prior to its enactment,¹ and generally, the legislature cannot retroactively impose a tax on a transfer fully consummated² or remove therefrom an existing exemption.³ However, in the absence of constitutional provision otherwise, it may retroactively reduce the rate of a tax on a consummated taxable transfer⁴ or entirely waive the right to the tax and grant a complete exemption where none existed before.⁵

The legislature cannot impose an inheritance tax with respect to the transfer of property which has already been delivered to heirs and distributees⁶ or on remainders which, although coming into possession thereafter, have vested before the passage of

the act,⁷ although it is otherwise where the remainder has not so vested.⁸ However, a statute which levies an inheritance tax on successions not finally closed and administered is not unconstitutional on the ground that it is retroactive.⁹

Where, by a deed of trust or transfer intended to take effect on the death of the settlor or grantor, a power of appointment, revocation, or change has been reserved by him or her, the transfer as to the beneficiary is thus left incomplete until the settlor's death, and the legislature may constitutionally tax the transfer by a statute passed after the execution of the deed but before the death of the settlor or grantor.¹⁰ On the other hand, a law imposing an estate tax on property transferred by irrevocable trust prior to its enactment is invalid¹¹ since in such case the rights of the beneficiary vest immediately and are not deferred to the death of the grantor occurring after the passage of the act.¹² Even though a transfer is irrevocable in form, if the interest of the remainderman or beneficiary is contingent on the death of the grantor, the transfer may be taxed by a statute passed subsequent to the execution of the deed but before the death of the grantor.¹³ A statute which does not impose a tax but merely establishes a conclusive presumption with respect to transferred property may be applied to transfers made prior to its enactment.¹⁴

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Footnotes

- 1 Wis.—*Miller v. Wisconsin Dept. of Taxation*, 241 Wis. 615, 6 N.W.2d 827 (1942).
 - 2 U.S.—*Untermeyer v. Anderson*, 276 U.S. 440, 48 S. Ct. 353, 72 L. Ed. 645 (1928); *Blodgett v. Holden*, 275 U.S. 142, 276 U.S. 594, 48 S. Ct. 105, 72 L. Ed. 206 (1927).
 - 3 N.Y.—*City Bank Farmers' Trust Co. v. New York Cent. R. Co.*, 253 N.Y. 49, 170 N.E. 489, 69 A.L.R. 940 (1930).
 - 4 Iowa—*In re Pedersen's Estate*, 198 Iowa 166, 196 N.W. 785 (1924).
 - 5 Tenn.—*Bank of Commerce & Trust Co. v. McLemore*, 162 Tenn. 137, 35 S.W.2d 31 (1931).
 - 6 La.—*Succession of Stauffer*, 119 La. 66, 43 So. 928 (1907).
- Illegal transfer**
An illegal transfer by an executor is not such transfer as to preclude its being taxed by a subsequent statute.
- Iowa—*Montgomery v. Gilbertson*, 134 Iowa 291, 111 N.W. 964 (1907).
 - 7 N.Y.—*In re Pell's Estate*, 171 N.Y. 48, 63 N.E. 789 (1902).
 - 8 Mass.—*Attorney General v. Stone*, 209 Mass. 186, 95 N.E. 395 (1911).
 - 9 Wash.—*Seattle Discount Corp. v. Hollywood Inv. Co.*, 184 Wash. 14, 49 P.2d 475 (1935).
- Amendment regarding qualified terminable interest property**
A retroactive amendment allowing the Department of Revenue to tax qualified terminable interest property as part of a surviving spouse's estate did not violate due process and was not a substantial impairment to a contract.
- Wash.—*In re Estate of Hambleton*, 181 Wash. 2d 802, 335 P.3d 398 (2014).
- Curative act**
Defects in a statute in force at the time of the decedent's death may be cured by a retroactive statute passed before the final settlement and distribution of the estate.
- Ky.—*De Witt v. Commonwealth*, 184 Ky. 437, 212 S.W. 437 (1919).
- 10 U.S.—*Saltonstall v. Saltonstall*, 276 U.S. 260, 48 S. Ct. 225, 72 L. Ed. 565 (1928).
- Power to change insurance beneficiary**
Where the deceased insured has reserved the right to change the beneficiary named in a life insurance policy, the legislature may, by a statute passed after the policy has been taken out, impose an inheritance tax with reference to the proceeds of the policy although the named beneficiary is entitled to the proceeds because of the insured's failure to exercise the power to change the beneficiary.
- Tenn.—*State v. Cain*, 162 Tenn. 213, 36 S.W.2d 82 (1931).
- 11 U.S.—*Nichols v. Coolidge*, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081 (1927).
- 12 U.S.—*Coolidge v. Long*, 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed. 562 (1931).
- 13 N.J.—*Carter v. Bugbee*, 92 N.J.L. 390, 106 A. 412 (N.J. Ct. Err. & App. 1919).

14

Reservation of life interest

Cal.—[Hagny v. Flournoy](#), 19 Cal. App. 3d 496, 96 Cal. Rptr. 786 (2d Dist. 1971).

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16A C.J.S. Constitutional Law II VII B Refs.

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

[Topic Summary](#) | [Correlation Table](#)

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16A C.J.S. Constitutional Law § 661

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

1. In General

§ 661. Curative statutes and retroactivity, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

A validating statute or curative act is one whose purpose is to cure past errors, omissions, and neglects, and it is an act intended to give legal effect to a past act ineffective because of noncompliance with legal requirements.

A curative or validating statute is one whose purpose is to cure past errors, omissions, and neglects and thus to make valid what, before the enactment of the statute, was invalid.¹ Such an act, in the ordinary sense of the term, is a retrospective law, acting on past cases and existing rights.² It is an act intended to give legal effect to some past act or transaction which is ineffective because of neglect to comply with some requirement of law.³ It contemplates that the legislature has been advised of the nature of the matters done and performed which it purports to validate, ratify, or confirm.⁴ A validating statute, however, grants no indulgence for the correction of future errors and neglects.⁵ Moreover, a new statute will not be deemed "curative," for purposes of determining prospective or retroactive application, simply because the legislative history of that statute reflects disapproval of a contractual provision previously found permissible by the courts based upon common-law contract principles.⁶

Validating unconstitutional statutes and actions.

A legislature is without power to validate, by a general curative act, a prior statute which does not comply with constitutional requirements.⁷

While a legislature can legalize actions taken without compliance with purely statutory requirements by which a public agency acquires jurisdiction, retroactive legislation purporting to cure constitutionally based jurisdictional defects underlying agency action potentially may implicate procedural due process.⁸

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Footnotes

- 1 Colo.—[Farnik v. Board of County Com'rs of Weld County](#), 139 Colo. 481, 341 P.2d 467 (1959).
- 2 U.S.—[In re Caldwell Port Elevator, Inc.](#), 23 B.R. 154 (Bankr. W.D. La. 1982).
- Ind.—[State ex rel. Atty. Gen. v. Lake Superior Court](#), 820 N.E.2d 1240 (Ind. 2005).
- 3 Tex.—[Moorman v. Hunnicutt](#), 325 S.W.2d 941 (Tex. Civ. App. Austin 1959), writ refused n.r.e.
To make legal and regular that which was illegal and irregular
 Conn.—[Hayes Family Ltd. Partnership v. Planning and Zoning Com'n of Town of Manchester](#), 98 Conn. App. 213, 907 A.2d 1235 (2006).
Statute of limitations distinguished
 The distinction between a curative act and a statute of limitations is that one is enacted to cure past irregularities which are not jurisdictional and the other to bar any right, however high the source from which it may be deduced.
 N.Y.—[Dunkum v. Maceck Bldg. Corporation](#), 256 N.Y. 275, 176 N.E. 392 (1931).
- 4 Fla.—[Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello](#), 159 Fla. 134, 31 So. 2d 905 (1947).
- 5 Colo.—[Farnik v. Board of County Com'rs of Weld County](#), 139 Colo. 481, 341 P.2d 467 (1959).
- 6 N.J.—[Botis v. Estate of Kudrick](#), 421 N.J. Super. 107, 22 A.3d 975 (App. Div. 2011).
- 7 Tex.—[Globe Indem. Co. v. Barnes](#), 280 S.W. 275 (Tex. Civ. App. Amarillo 1926).
 As to statute which does not comply with constitutional requirements as void ab initio, see § 150.
- 8 § 664.

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16A C.J.S. Constitutional Law § 662

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

1. In General

§ 662. Validity of curative statutes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

The enactment of curative statutes within proper limits is within the power of the legislature provided it is not prohibited by the constitution, and subject to constitutional limitations, a legislature may cure irregularities in past proceedings not extending to jurisdiction, and may ratify and validate acts which it could have authorized in advance and may still authorize, or may cure what it could have dispensed with, but it cannot validate void proceedings.

A curative statute may validly be applied retroactively¹ or operate retrospectively² even in cases involving a long period of retroactivity.³ The enactment of curative statutes within proper limits constitutes a valid exercise of legislative power⁴ provided there is no applicable constitutional prohibition.⁵ However, such legislation must exhibit on its face evidence that it is intended to cure or validate defective legislation.⁶ When, for instance, a statute or regulation is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive as curative.⁷ Under some authority, an enactment is curative, and thus may be applied retroactively, only if it clarifies or technically corrects an ambiguous statute.⁸

The retrospective application of a statute that is purely procedural or remedial in nature does not violate a state constitutional prohibition against retrospective or retroactive legislation.⁹ Thus, a legislature may, by retrospective statute, cure mere irregularities in prior proceedings¹⁰ which do not extend to matters of jurisdiction¹¹ or the defective exercise of an existing power where the defect does not go to the fundamentals of the power exercised.¹²

Furthermore, the legislature ordinarily may ratify and validate any past act which it could originally have authorized,¹³ so that an act ratified will be equivalent to an act performed under an original grant of power,¹⁴ provided the legislature still has the power to authorize it¹⁵ and its authorization does not impair vested rights¹⁶ and provided further that constitutional inhibitions are observed.¹⁷ Validation acts are not limited to correcting procedural irregularities unless expressly so limited.¹⁸ Indeed, the power of the legislature to pass curative acts is without any limit except such as is imposed by constitutional restrictions.¹⁹

Common expressions of the rule are to the effect that the legislature may validate retrospectively any proceeding which it might have authorized in advance or may cure by subsequent statute what it might have dispensed with altogether.²⁰ Accordingly, statutes curing defects in acts done, or authorizing or confirming the exercise of powers, are valid where the legislature originally had authority to confer the powers or authorize the acts.²¹ A legislative act that cures an illegality or defect may be passed and become operative after a suit is brought to enforce rights accruing by reason of the illegality or defect.²² Curative statutes which are effective to cure defects in prior proceedings are effective to cure the same defects in pending proceedings.²³

On the other hand, a statute in the form of a curative act is void if it violates due process,²⁴ or if it attempts to impair vested rights²⁵ or deprives any person of a specific title or of specific property which he or she has acquired,²⁶ or if it impairs contractual obligations,²⁷ or if it attempts to validate or confirm what the legislature could not originally have authorized²⁸ or cannot authorize at the time of ratification.²⁹ The legislature has no power to validate void proceedings,³⁰ particularly where they have been previously declared void.³¹ Further, it cannot cure a want of authority or power to act at all,³² nor can it cure acts or proceedings which violate constitutional requirements or prohibitions.³³

Even where the legislature could have authorized an act, it cannot ratify it retrospectively where the result would be to ignore an applicable penal statute.³⁴ Acts done in conformity with a statute which, although clearly within the legislature's power to enact, is invalid by reason of some defect may be validated by a curative statute,³⁵ despite a prior judicial declaration of the unconstitutionality of the statute,³⁶ particularly where a public right is involved.³⁷ Acts done under statutes which are unconstitutional by reason of the legislature's lack of power to enact them cannot, however, be validated,³⁸ particularly where the statutes have been so adjudged.³⁹

CUMULATIVE SUPPLEMENT

Cases:

Facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. [In re Guardianship of Chamberlain, 2015 ME 76, 118 A.3d 229 \(Me. 2015\).](#)

[END OF SUPPLEMENT]

Footnotes

- 1 U.S.—*Nguyen v. County of Clark*, 732 F. Supp. 2d 1190 (W.D. Wash. 2010) (under Washington law).
Iowa—*Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010).
N.J.—*Strategic Environmental Partners, LLC v. New Jersey Dept. of Environmental Protection*, 438 N.J. Super. 125, 102 A.3d 939 (App. Div. 2014).
Wash.—*1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wash. 2d 566, 146 P.3d 423 (2006), as corrected, (Nov. 15, 2006).
- 2 Ga.—*O'Leary v. Whitehall Const.*, 288 Ga. 790, 708 S.E.2d 353 (2011).
- 3 **No litmus test for reasonable period of retroactivity**
Iowa—*Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010).
- 4 Ga.—*DeKalb County v. State*, 270 Ga. 776, 512 S.E.2d 284 (1999).
Ill.—*People v. Reedy*, 186 Ill. 2d 1, 237 Ill. Dec. 74, 708 N.E.2d 1114 (1999).
Ind.—*State ex rel. Atty. Gen. v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005).
Ohio—*Wilson v. AC&S, Inc.*, 169 Ohio App. 3d 720, 2006-Ohio-6704, 864 N.E.2d 682 (12th Dist. Butler County 2006), cause dismissed, 113 Ohio St. 3d 1457, 2007-Ohio-1787, 864 N.E.2d 645 (2007).
Two tests
Curative legislation to be valid and constitutional must meet two tests: that the legislature originally had the power to authorize the acts done or to confer the powers exercised and that contracts are not impaired nor vested rights disturbed.
Kan.—*State ex rel. Tomasic v. Kansas City*, 230 Kan. 404, 636 P.2d 760 (1981).
- 5 U.S.—*Nguyen v. County of Clark*, 732 F. Supp. 2d 1190 (W.D. Wash. 2010) (under Washington law).
Miss.—*Russell Inv. Corporation v. Russell*, 182 Miss. 385, 182 So. 102 (1938).
Wash.—*1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wash. 2d 566, 146 P.3d 423 (2006), as corrected, (Nov. 15, 2006).
Against retroactive laws generally
All legislation cannot be judged by theoretical standards but must be tested by concrete conditions which induced it, and curative acts which operate on conditions already existing may have both prospective and retrospective operations without being retroactive laws within the constitutional inhibition against retroactive laws generally.
Ohio—*State ex rel. Hanrahan v. Zupnik*, 95 Ohio App. 367, 53 Ohio Op. 381, 64 Ohio L. Abs. 470, 111 N.E.2d 405 (8th Dist. Cuyahoga County 1953), judgment aff'd, 161 Ohio St. 43, 52 Ohio Op. 481, 117 N.E.2d 689 (1954).
- 6 Ill.—*People v. Reedy*, 186 Ill. 2d 1, 237 Ill. Dec. 74, 708 N.E.2d 1114 (1999).
- 7 Wash.—*State v. Bunker*, 144 Wash. App. 407, 183 P.3d 1086 (Div. 1 2008), aff'd, 169 Wash. 2d 571, 238 P.3d 487 (2010).
- 8 Wash.—*1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wash. 2d 566, 146 P.3d 423 (2006), as corrected, (Nov. 15, 2006).
- 9 Colo.—*People v. McCreddie*, 938 P.2d 528 (Colo. 1997).
Ohio—*State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829 (2002).
Eligibility to conduct gambling operations
The section of the state constitution prohibiting retrospective laws was not violated when the State declared that a lodge was ineligible to apply for a license to sell pull tab tickets based on the lodge's prior convictions for illegal gambling, which involved acts occurring before the effective dates of amended statutes that prohibited persons who have been convicted of a felony or class A misdemeanor within the previous 10 years from applying for a license to sell pulltab tickets; the statutes were remedial in nature since the legislature acted with the remedial purpose of protecting the public by designating a reasonable ground for determining the eligibility of those who wish to conduct legal gambling operations in the state.
N.H.—*In re Franklin Lodge of Elks No. 1280 BPOE*, 151 N.H. 565, 864 A.2d 325 (2004).
- 10 U.S.—*Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 60 S. Ct. 600, 84 L. Ed. 814 (1940).
Cal.—*Fleming v. Kent*, 129 Cal. App. 3d 887, 181 Cal. Rptr. 361, 2 Ed. Law Rep. 1115 (1st Dist. 1982).
Statutes curing past administrative action, see § 664.

Nonobservance of requirements

Cal.—*Golden Gate Bridge and Highway Dist. v. Felt*, 214 Cal. 308, 5 P.2d 585 (1931).

Conn.—*Sanger v. City of Bridgeport*, 124 Conn. 183, 198 A. 746, 116 A.L.R. 1031 (1938).

Waiver of technical statutory violations

Pa.—*Appeal of Palmer*, 307 Pa. 426, 161 A. 543 (1932).

11 Cal.—*Fleming v. Kent*, 129 Cal. App. 3d 887, 181 Cal. Rptr. 361, 2 Ed. Law Rep. 1115 (1st Dist. 1982).

Conn.—*Hayes Family Ltd. Partnership v. Planning and Zoning Com'n of Town of Manchester*, 98 Conn. App. 213, 907 A.2d 1235 (2006).

Iowa.—*Swanson v. Pontralo*, 238 Iowa 693, 27 N.W.2d 21 (1947).

Md.—*Dryfoos v. Hostetter*, 268 Md. 396, 302 A.2d 28 (1973).

Voidable transactions

Curative legislation is valid if its operation extends only to transactions voidable for defects not inhering therein.

Okla.—*McLain v. Oklahoma Cotton Growers' Ass'n*, 1927 OK 188, 125 Okla. 264, 258 P. 269 (1927).

12 Ill.—*People ex rel. Rhodes v. Miller*, 392 Ill. 445, 64 N.E.2d 869 (1946).

13 Ala.—*Alabama Alcoholic Beverage Control Bd. v. City of Pelham*, 855 So. 2d 1070 (Ala. 2003).

Cal.—*Hewitt v. Rincon Del Diablo Municipal Water Dist.*, 107 Cal. App. 3d 78, 165 Cal. Rptr. 545 (4th Dist. 1980).

Obligations which could have been authorized in the beginning

Ala.—*Newman v. City of Opelika*, 224 Ala. 70, 139 So. 247 (1932).

14 Cal.—*Hewitt v. Rincon Del Diablo Municipal Water Dist.*, 107 Cal. App. 3d 78, 165 Cal. Rptr. 545 (4th Dist. 1980).

15 U.S.—*Katzenberger v. City of Aberdeen*, 121 U.S. 172, 7 S. Ct. 947, 30 L. Ed. 911 (1887).

16 U.S.—*Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 60 S. Ct. 600, 84 L. Ed. 814 (1940).

Ala.—*Alabama Alcoholic Beverage Control Bd. v. City of Pelham*, 855 So. 2d 1070 (Ala. 2003).

Cal.—*Hewitt v. Rincon Del Diablo Municipal Water Dist.*, 107 Cal. App. 3d 78, 165 Cal. Rptr. 545 (4th Dist. 1980).

Conn.—*Hayes Family Ltd. Partnership v. Planning and Zoning Com'n of Town of Manchester*, 98 Conn. App. 213, 907 A.2d 1235 (2006).

La.—*Smith v. City of New Orleans ex rel. Shires*, 71 So. 3d 525 (La. Ct. App. 4th Cir. 2011).

17 Cal.—*Fleming v. Kent*, 129 Cal. App. 3d 887, 181 Cal. Rptr. 361, 2 Ed. Law Rep. 1115 (1st Dist. 1982).

Tex.—*Jamison v. City of Pearland*, 401 S.W.2d 322 (Tex. Civ. App. Waco 1966).

Effect of language or recital

The presence of "curative" language, or a recital that the legislature in the past really intended what was now being enacted into law, cannot render a statute immune from a constitutional challenge on retroactivity grounds.

Mich.—*Washington Nat. Arena Ltd. Partnership v. Treasurer, Prince George's County*, 287 Md. 38, 410 A.2d 1060 (1980).

18 Cal.—*Hewitt v. Rincon Del Diablo Municipal Water Dist.*, 107 Cal. App. 3d 78, 165 Cal. Rptr. 545 (4th Dist. 1980).

19 S.D.—*Grand Lodge A. O. U. W. of N. D. v. Fischer*, 70 S.D. 562, 21 N.W.2d 213, 161 A.L.R. 1466 (1945).

20 U.S.—*Charlotte Harbor & N. Ry. Co. v. Welles*, 260 U.S. 8, 43 S. Ct. 3, 67 L. Ed. 100 (1922).

Conn.—*Connecticut State Employees Ass'n, Inc. v. Connecticut Personnel Policy Bd.*, 165 Conn. 448, 334 A.2d 909 (1973).

21 Cal.—*Rock Creek Water District v. County of Calaveras*, 133 Cal. App. 2d 141, 283 P.2d 740 (3d Dist. 1955).

La.—*Long v. Northeast Soil Conservation Dist. of La.*, 226 La. 824, 77 So. 2d 408 (1954).

22 U.S.—*Goddard v. Frazier*, 156 F.2d 938 (C.C.A. 10th Cir. 1946).

23 Pa.—*In re Malick*, 137 Pa. Super. 139, 8 A.2d 494 (1939).

24 Cal.—*Saunders v. Carr*, 268 Cal. App. 2d 10, 74 Cal. Rptr. 147 (2d Dist. 1968).

Ind.—*State ex rel. Atty. Gen. v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005).

25 Cal.—*Rock Creek Water District v. County of Calaveras*, 133 Cal. App. 2d 141, 283 P.2d 740 (3d Dist. 1955).

Md.—*Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 805 A.2d 1061 (2002).

As to power of legislature to divest vested rights, generally, see § 473.

Transfer of title from one person to another

N.Y.—*Ostrander v. Bell*, 199 A.D. 304, 192 N.Y.S. 262 (3d Dep't 1921), *aff'd*, 234 N.Y. 566, 138 N.E. 449 (1922).

26 N.Y.—*Bradford v. Suffolk County*, 257 A.D. 777, 15 N.Y.S.2d 353 (2d Dep't 1939), judgment modified on other grounds, 283 N.Y. 503, 28 N.E.2d 932 (1940).

27 Ala.—*Alabama Alcoholic Beverage Control Bd. v. City of Pelham*, 855 So. 2d 1070 (Ala. 2003).

Ind.—*State ex rel. Atty. Gen. v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005).

28 S.C.—*O'Shields v. Caldwell*, 207 S.C. 194, 35 S.E.2d 184 (1945).

Estoppel

The legislature cannot pass a law validating by estoppel an act it cannot authorize.

Tex.—*L.E. Whitham & Co. v. Hendrick*, 1 S.W.2d 907 (Tex. Civ. App. Fort Worth 1927), writ refused, (Mar. 14, 1928).

29 U.S.—*Forbes Pioneer Boat Line v. Board of Com'rs of Everglades Drainage Dist.*, 258 U.S. 338, 42 S. Ct. 325, 66 L. Ed. 647 (1922).

30 Ala.—*Horton v. Carter*, 253 Ala. 325, 45 So. 2d 10 (1950).

Ill.—*People ex rel. Shore v. Helmer*, 410 Ill. 420, 102 N.E.2d 96 (1951).

31 Ill.—*People ex rel. Endicott v. Prather*, 343 Ill. 443, 175 N.E. 658, 74 A.L.R. 874 (1931).

32 Ariz.—*Ferguson v. Superior Court of Maricopa County*, 76 Ariz. 31, 258 P.2d 421 (1953).

Md.—*Dryfoos v. Hostetter*, 268 Md. 396, 302 A.2d 28 (1973).

Want of legislative power to appoint state treasurer

Me.—*In re Opinion of the Justices*, 137 Me. 350, 19 A.2d 53 (1941).

33 Ill.—*People ex rel. Shore v. Helmer*, 410 Ill. 420, 102 N.E.2d 96 (1951).

Unconstitutional appropriation

Ky.—*Board of Educ. of Calloway County v. Talbott*, 261 Ky. 66, 86 S.W.2d 1059 (1935).

34 Cal.—*City of Los Angeles v. Watterson*, 8 Cal. App. 2d 331, 48 P.2d 87 (4th Dist. 1935).

35 U.S.—*Alaska SS Co. v. Mullaney*, 12 Alaska 594, 180 F.2d 805 (9th Cir. 1950).

36 Tex.—*Anderson County Road Dist. No. 8 v. Pollard*, 116 Tex. 547, 296 S.W. 1062 (1927).

Partial validity

A statute validating acts done under that part of a statute, previously declared unconstitutional, which was within the power of the legislature to enact, is valid.

Pa.—*Com. ex rel. James v. Woodring*, 289 Pa. 437, 137 A. 635 (1927).

37 Iowa—*Wilcox v. Miner*, 201 Iowa 476, 205 N.W. 847 (1925).

38 Ark.—*State, for Use and Benefit of Garland County v. Jones*, 198 Ark. 756, 131 S.W.2d 612 (1939).

39 Neb.—*Anderson v. Lehmkuhl*, 119 Neb. 451, 229 N.W. 773 (1930).

16A C.J.S. Constitutional Law § 663

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

1. In General

§ 663. Judicial proceedings

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

Judicial acts invalid for procedural irregularities may be cured by subsequent statute, but judicial proceedings cannot be so validated where the court lacked jurisdiction or where validation would divest vested rights.

Judicial acts which are void or invalid for irregularity in procedure may be cured by the legislature¹ where the legislature might have dispensed originally with the portion of the required proceeding which has not been observed.² Thus, it may cure irregularities in court orders not seasonably filed.³

However, judicial proceedings cannot be validated by curative statutes where the court lacked jurisdiction⁴ or where the effect of such validation would be to divest vested rights.⁵ The legislature cannot validate or vitalize a judgment which is entirely void.⁶

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Footnotes

- 1 Ala.—*Horton v. Carter*, 253 Ala. 325, 45 So. 2d 10 (1950).
Defective conveyance under judicial sale
U.S.—*Kearney v. Taylor*, 56 U.S. 494, 15 How. 494, 14 L. Ed. 787, 1853 WL 7638 (1853).
Contingent rights
Contingent rights in real estate may be affected by statutes validating prior judicial proceedings.
N.C.—*Anderson v. Wilkins*, 142 N.C. 154, 55 S.E. 272 (1906).
Parties
A statute designed to cure a defect occasioned by the failure to make the United States a party to a partition proceeding begun by Indian heirs in a state court is constitutional, is not contrary to the due process clause, and is applicable to the pending proceeding.
U.S.—*Frazier v. Goddard*, 63 F. Supp. 696 (E.D. Okla. 1945).
- 2 Or.—*Hughes v. Aetna Cas. & Sur. Co.*, 234 Or. 426, 383 P.2d 55 (1963).
- 3 S.D.—*Davey v. McShane*, 47 S.D. 265, 197 N.W. 680 (1924).
- 4 Ala.—*Horton v. Carter*, 253 Ala. 325, 45 So. 2d 10 (1950).
Or.—*Hughes v. Aetna Cas. & Sur. Co.*, 234 Or. 426, 383 P.2d 55 (1963).
Judgment affecting substantial rights
A curative act cannot validate a judgment affecting substantial property rights, obtained without jurisdiction.
Mont.—*Scilley v. Red Lodge-Rosebud Irr. Dist.*, 83 Mont. 282, 272 P. 543 (1928).
Total want of notice
The requirement that some notice be given in probate proceedings is jurisdictional, and the legislature cannot by curative act validate jurisdictional defects or inject life into a proceeding which for total want of notice is lifeless.
Wyo.—*Addison v. Fleenor*, 65 Wyo. 119, 196 P.2d 991 (1948).
- 5 Or.—*Hughes v. Aetna Cas. & Sur. Co.*, 234 Or. 426, 383 P.2d 55 (1963).
As to power of legislature to divest vested rights, see § 473.
Void foreclosure sale
A statute purporting to validate a prior void foreclosure sale was unconstitutional as against the fee owner of realty in possession at the time of its enactment since the effect of such validation would be to divest the fee owner of vested rights.
Minn.—*Fuller v. Mohawk Fire Ins. Co.*, 187 Minn. 447, 245 N.W. 617 (1932).
- 6 Tex.—*Genzer v. Phillip*, 134 S.W.2d 730 (Tex. Civ. App. Austin 1939), writ dismissed, judgment correct.

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

1. In General

§ 664. Administrative action

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

Acts of state agencies or officers in excess of their authority may be legalized if the legislature originally could have granted such authority provided vested rights are not impaired.

Generally, the legislature may legalize the acts of state agencies or officers in excess of their authority,¹ if the legislature could have originally granted such authority,² provided vested rights are not impaired by such subsequent legislation.³ However, while a legislature can legalize actions taken without compliance with purely statutory requirements by which a public agency acquires jurisdiction, retroactive legislation purporting to cure constitutionally based jurisdictional defects underlying agency action potentially may implicate procedural due process.⁴

The legislature has the power to pass a retroactive statute to cure an act of a state agency where the defect to be cured is a defect in administration.⁵

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Footnotes

- 1 Mass.—[Opinion of the Justices](#), 360 Mass. 894, 274 N.E.2d 336 (1971).
- 2 Mass.—[Opinion of the Justices](#), 360 Mass. 894, 274 N.E.2d 336 (1971).
- 3 Mass.—[Opinion of the Justices](#), 360 Mass. 894, 274 N.E.2d 336 (1971).
- 4 Conn.—[Hayes Family Ltd. Partnership v. Planning and Zoning Com'n of Town of Manchester](#), 98 Conn. App. 213, 907 A.2d 1235 (2006).
- As to proceedings of municipalities and municipal agencies, generally, see § 665.
- 5 **Prior commencement of action**
A retroactive statute enacted to cure the department of treasury's unauthorized use of a procedure for the collection of corporate franchise taxes could be applied to a corporation which commenced an action challenging the procedure before the curative act was passed.
Mich.—[Great Scott Supermarkets, Inc. v. Michigan Dept. of Treasury, Corporate Franchise Fee Division](#), 113 Mich. App. 679, 318 N.W.2d 537 (1982), judgment aff'd, 419 Mich. 582, 358 N.W.2d 839 (1984).

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

2. Proceedings of Municipalities

§ 665. Generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

Where unauthorized acts or proceedings of a municipal or quasimunicipal corporation could have been authorized in advance, or where defects in proceedings of such a corporation could have been dispensed with, the legislature may cure such want of authority or defect by subsequent legislation, and the legislature may cure the invalid organization or creation of such bodies.

Acts and proceedings of municipal and quasimunicipal corporations and their agencies or officers, which are invalid either because of informality or irregularity or because in excess of the authority conferred by law, may ordinarily be cured by the legislature by subsequent statute¹ if the legislature could have originally authorized such acts or proceedings, or if the defect is with respect to a matter with which it could have dispensed,² and if there is no constitutional restriction.³ The legislature may also cure the invalid organization or creation of municipalities,⁴ counties,⁵ school districts,⁶ and other subdivisions of the State⁷ even after an adjudication by a court that they have no legal existence.⁸

Statutes have been sustained which validate ordinances passed by a city council organized under an unconstitutional statute,⁹ resolutions of a city council not passed in accordance with the requirements of a city charter,¹⁰ and actions and proceedings of governing bodies taken at irregular meetings.¹¹ Other statutes have been upheld which have validated unauthorized or informal acts of municipal corporations or their officers in making contracts,¹² conveyances of public property or a grant of land,¹³ contracting debts,¹⁴ and granting pensions.¹⁵

Elections.

The rule that the legislature may validate retrospectively any proceeding which it might have authorized in advance includes the validation of unauthorized elections.¹⁶ Thus, statutes curing irregularities in a prior election are valid.¹⁷ A statute is void, however, insofar as it undertakes to legalize an election held without statutory or constitutional authority.¹⁸

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Footnotes

- 1 Ind.—*City of Bloomington v. Hudgins*, 177 Ind. App. 445, 383 N.E.2d 400 (1978).
Nev.—*Harris v. City of Reno*, 81 Nev. 256, 401 P.2d 678 (1965).
S.C.—*City of Florence v. Turbeville*, 239 S.C. 126, 121 S.E.2d 437, 85 A.L.R.2d 1143 (1961).
Acts passed pending judicial proceedings
Such curative acts may be valid although made during pending judicial proceedings.
Wis.—*State v. Van Huse*, 120 Wis. 15, 97 N.W. 503 (1903).
- 2 Ind.—*Yelton v. Plantz*, 228 Ind. 79, 89 N.E.2d 540 (1950).
Tenn.—*Baker v. Milam*, 191 Tenn. 54, 231 S.W.2d 381 (1950).
Lack of power or jurisdiction
Where a city commission had no power or jurisdiction at the time of proceedings forming the basis of the action, any legislative attempt to confer power and jurisdiction upon it retrospectively must fail.
Ind.—*City of Bloomington v. Hudgins*, 177 Ind. App. 445, 383 N.E.2d 400 (1978).
Attorney's fees
Where the legislature could not in the first instance authorize payments of money by commissioners of a highway and bridge district for services of an attorney employed to contest the validity of the act creating the district and for lobbying services, etc., it could not ratify and confirm such payments.
Ark.—*Miller County Highway and Bridge Dist. v. Cook*, 134 Ark. 328, 204 S.W. 420 (1918).
- 3 Tex.—*Temple Independent School Dist. v. Proctor*, 97 S.W.2d 1047 (Tex. Civ. App. Austin 1936), writ refused.
- 4 Ill.—*People ex rel. Polivka v. Padley*, 340 Ill. 314, 172 N.E. 763 (1930).
- 5 Mont.—*Church v. Lincoln County*, 100 Mont. 238, 46 P.2d 681 (1935).
- 6 N.H.—*Jennison v. Oyster River Co-op. School Dist. No. 2*, 99 N.H. 424, 113 A.2d 117 (1955).
- 7 **Drainage district**
Fla.—*Towns v. State*, 102 Fla. 188, 135 So. 822 (1931).
Road district
Tex.—*Louisiana Ry. & Nav. Co. v. State*, 298 S.W. 462 (Tex. Civ. App. Dallas 1927), writ granted, (Dec. 14, 1927) and aff'd, 7 S.W.2d 71 (Tex. Comm'n App. 1928).
Water improvement district
Tex.—*Western Union Telegraph Co. v. Wichita County Water Improvement Dist. No. 1*, 30 S.W.2d 301 (Tex. Comm'n App. 1930).
- 8 Fla.—*Schultz v. State*, 80 Fla. 564, 86 So. 428 (1920).
- 9 Pa.—*City of Chester v. Pennell*, 169 Pa. 300, 32 A. 408 (1895).
- 10 Md.—*County Council for Prince George's County v. Carl M. Freeman Associates, Inc.*, 281 Md. 70, 376 A.2d 860 (1977).
- 11 Ind.—*Board of Com'rs of Wells County v. Fahlor*, 132 Ind. 426, 31 N.E. 1112 (1892).

- 12 Iowa—Iowa Elec. Light & Power Co. v. Incorporated Town of Grand Junction, 221 Iowa 441, 264 N.W. 84 (1935).
- 13 Cal.—3-H Securities Co. v. Kibby, 135 Cal. App. 173, 26 P.2d 893 (3d Dist. 1933).
- Unauthorized land grant**
- The legislature, having power to make a grant of land, has power to ratify a grant already made without its authority.
- Tex.—State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065 (1932).
- Sale to nonprofit corporation**
- A statute expressly validating all auction sales of realty by a city to nonprofit corporations organized for educational and other purposes, at which sales bidding was limited to such corporations, notwithstanding any defect, irregularity, or omission of any lawful requirement or lack of statutory authority and notwithstanding any provision of a charter, code, or any other law, general, special, or local, is constitutional, although retroactive, in the absence of a vested interest adversely affected by retroactivity of the statute, and a taxpayer possessed no such vested interest.
- N.Y.—Hama Realty Co. v. City of New York, 52 Misc. 2d 192, 274 N.Y.S.2d 392 (Sup 1966), judgment aff'd, 27 A.D.2d 988, 281 N.Y.S.2d 974 (1st Dep't 1967).
- 14 Mich.—Chemical Bank & Trust Co. v. Oakland County, 264 Mich. 673, 251 N.W. 395 (1933).
- 15 Mass.—Gray v. City of Salem, 271 Mass. 495, 171 N.E. 432 (1930).
- 16 N.D.—Osage Nat. Bank v. Oakes Special School Dist., 72 N.D. 457, 7 N.W.2d 920 (1943).
- 17 Mont.—Church v. Lincoln County, 100 Mont. 238, 46 P.2d 681 (1935).
- Particular defects**
- A curative act may remedy such defects as improper petitions for calling of an election, the failure of petitions to bear the required number of signers, improper ballots, and the casting of illegal votes.
- Ill.—People v. Birdsong, 398 Ill. 455, 76 N.E.2d 185 (1947).
- 18 Ind.—Seitz v. Mosier, 192 Ind. 416, 136 N.E. 840 (1922).

16A C.J.S. Constitutional Law § 666

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

2. Proceedings of Municipalities

§ 666. Bonds

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

It is within the power of the legislature to validate by curative statute municipal bonds issued or disposed of irregularly or without authority if the legislature could have authorized their issuance initially and can do so at the time of validation.

Irregularly issued bonds of a municipal or quasimunicipal corporation may be validated by the legislature through a curative statute,¹ and the legislature may validate municipal bonds disposed of² or issued pursuant to preliminary proceedings instituted without authority.³ Moreover, even where the municipality lacked authority to issue bonds, or exceeded such authority as it did have, the legislature may validate them,⁴ although they have been declared invalid,⁵ provided the issuance of such bonds could originally have been authorized.⁶ The same rule applies to bonds issued by an invalidly created subdivision of the State where the legislature ratifies its creation.⁷

Under these rules, statutes have been sustained validating invalid or defective issues of county bonds for the construction of a county road,⁸ of township bonds for the construction of a railway,⁹ as well as statutes authorizing repayment in subsequent

bonds of proceeds received from sales of prior void bonds¹⁰ or prohibiting counties from denying the validity of bonds on which they have received subscriptions and paid interest.¹¹

It is, however, beyond the power of the legislature to validate an issue of bonds which it had no constitutional right to authorize,¹² regulate, or control.¹³

Excessive amount.

Municipal bonds in excess of the amount of indebtedness permitted by law may be validated by a subsequent legislative act where the limit exceeded is imposed by statute only¹⁴ and not by constitutional provisions.¹⁵

Consent of voters or taxpayers; election.

Where the legislature could have authorized the issuance of municipal bonds without submission of the question to the voters or taxpayers, it may validate an election on the question;¹⁶ however, where it cannot dispense with such submission, it cannot validate bonds issued without such consent.¹⁷ A bond issue election which is merely irregular may be validated by statute,¹⁸ but the legislature cannot validate an election which is absolutely void.¹⁹

Contracts or subscriptions in aid of corporations.

Irregular or unauthorized bonds or subscriptions by a municipality in aid of corporations may be validated by a curative statute²⁰ unless the legislature which passed the statute had no power under any circumstances to authorize such bonds or subscriptions,²¹ or the statute is void by reason of an express provision of the constitution.²²

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Footnotes

- 1 Or.—[State ex rel. Luckey v. James](#), 189 Or. 268, 219 P.2d 756 (1950).
Adjudication of voidness
An adjudication of a court that the issue of county bonds is unauthorized and void because of some irregularity does not defeat the right of the legislature, by subsequent curative act, to authorize their issuance. Fla.—[Givens v. Hillsborough County](#), 46 Fla. 502, 35 So. 88 (1903).
Failure to give notice
The legislature may, by subsequent act, validate bonds issued by a city without giving notice required by its charter. Miss.—[Griffith v. City of Vicksburg](#), 102 Miss. 1, 58 So. 781 (1912).
"Special act conferring corporate powers"
A constitutional prohibition against any "special act conferring corporate powers" does not prevent a statute validating defects and irregularities in corporate bonds as the statute does not confer any such powers but merely takes away from a municipality power to interpose an unconscionable defense to a just claim. U.S.—[Read v. City of Plattsburgh](#), 107 U.S. 568, 2 S. Ct. 208, 27 L. Ed. 414 (1883).
2 U.S.—[Thompson v. Perrine](#), 103 U.S. 806, 26 L. Ed. 612, 1880 WL 18823 (1880).
3 U.S.—[City of Quincy v. Cooke](#), 107 U.S. 549, 2 S. Ct. 614, 27 L. Ed. 549 (1883).
4 U.S.—[City of New Orleans v. Clark](#), 95 U.S. 644, 24 L. Ed. 521, 1877 WL 18671 (1877).
5 U.S.—[Utter v. Franklin](#), 172 U.S. 416, 19 S. Ct. 183, 43 L. Ed. 498 (1899).
6 Miss.—[Tonsmeire v. Board of Sup'rs, Harrison County](#), 1 So. 2d 511 (Miss. 1941).

- 7 Tex.—*Desdemona Independent School Dist. v. Howard*, 34 S.W.2d 840 (Tex. Comm'n App. 1931).
- 8 U.S.—*Ritchie v. Franklin County*, 89 U.S. 67, 22 L. Ed. 825, 1874 WL 17479 (1874).
- 9 N.C.—*Greene County v. Snow Hill Ry. Co.*, 197 N.C. 419, 149 S.E. 397 (1929).
- 10 Mont.—*State v. Dickerman*, 16 Mont. 278, 40 P. 698 (1895).
- 11 Tex.—*Nolan County v. State*, 83 Tex. 182, 17 S.W. 823 (1891).
- 12 Tex.—*Miller v. State ex rel. Abney*, 155 S.W.2d 1012 (Tex. Civ. App. Waco 1941), writ refused, (Jan. 7, 1942).
- 13 Cal.—*City of Long Beach v. Boynton*, 17 Cal. App. 290, 119 P. 677 (2d Dist. 1911).
- Fla.—*Weinberger v. Board of Public Instruction of St. Johns County*, 93 Fla. 470, 112 So. 253 (1927).
- Change in constitution**
A statute attempting to cure defective municipal bonds is invalid if it violates a constitutional inhibition which did not exist at the time of issuance of the bonds but intervenes prior to a curative act.
- U.S.—*Katzenberger v. City of Aberdeen*, 121 U.S. 172, 7 S. Ct. 947, 30 L. Ed. 911 (1887).
- 14 U.S.—*Read v. City of Plattsburgh*, 107 U.S. 568, 2 S. Ct. 208, 27 L. Ed. 414 (1883).
- 15 Tex.—*Mitchell County v. City Nat. Bank*, 15 Tex. Civ. App. 172, 39 S.W. 628 (1897), rev'd on other grounds, 91 Tex. 361, 43 S.W. 880 (1898).
- 16 U.S.—*City of Jonesboro v. Cairo & St. L.R. Co.*, 110 U.S. 192, 4 S. Ct. 67, 28 L. Ed. 116 (1884).
- 17 U.S.—*Katzenberger v. City of Aberdeen*, 121 U.S. 172, 7 S. Ct. 947, 30 L. Ed. 911 (1887).
- 18 U.S.—*Otoe County v. Baldwin*, 111 U.S. 1, 4 S. Ct. 265, 28 L. Ed. 331 (1884).
- 19 Ky.—*Berkley v. Board of Education of City of Lexington*, 22 Ky. L. Rptr. 638, 58 S.W. 506 (Ky. 1900).
- 20 U.S.—*Anderson v. Santa Anna Tp.*, 116 U.S. 356, 6 S. Ct. 413, 29 L. Ed. 633 (1886).
- 21 Wis.—*Ellis v. Northern Pac. R. Co.*, 77 Wis. 114, 45 N.W. 811 (1890).
- 22 S.C.—*Coleman v. Broad River Tp.*, 50 S.C. 321, 27 S.E. 774 (1897).

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16A C.J.S. Constitutional Law § 667

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

2. Proceedings of Municipalities

§ 667. Levy, assessment, and collection of taxes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

The power of the legislature to validate past municipal proceedings invalid for irregularity extends to irregular or defective proceedings for the assessment or collection of municipal taxes, and the legislature may cure a want of authority if it could have conferred it.

Where past proceedings for the assessment or collection of municipal taxes were invalid by reason of nonjurisdictional defects or irregularities, the legislature has the power to validate, or provide for the validation of, such proceedings,¹ and the same is true where the omission or irregularity was as to something which the legislature by a prior statute might have originally dispensed with or authorized to be done in the way in which it was done.² Ratification of a tax already imposed and collected cannot be equated with the retroactive imposition of a new tax for purposes of determining the constitutionality of retroactive application of a curative act.³

On the other hand, the legislature cannot cure or validate jurisdictional defects or wholly void proceedings,⁴ or an assessment or levy which it could not have authorized in the first instance,⁵ such as an assessment laid without regard to benefits,⁶ or

one which is invalid on constitutional grounds.⁷ Taxation proceedings initiated without authority to tax cannot be validated by subsequent legislation.⁸

Tax collection.

Congress may ratify by subsequent legislation unauthorized and illegal tax collection, giving it retroactive validity.⁹

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Footnotes

- 1 N.Y.—[Western New York & P. Ry. Co. v. City of Buffalo](#), 176 Misc. 350, 27 N.Y.S.2d 249 (Sup 1941), judgment aff'd, 264 A.D. 832, 35 N.Y.S.2d 751 (4th Dep't 1942), judgment aff'd, 290 N.Y. 702, 49 N.E.2d 633 (1943).
Fatal defect
The mere fact that a prior tax proceeding was fatally defective is not alone an insurmountable obstacle to the exercise of the curative power of the legislature.
Cal.—[Miller v. McKenna](#), 23 Cal. 2d 774, 147 P.2d 531 (1944).
Remedy to enforce payment
Where a statute makes a tax a perpetual lien on real estate, without providing a means to enforce it, a subsequent statute supplying such means, without creating any additional lien for prior assessments, is valid.
Neb.—[Schoenheit v. Nelson](#), 16 Neb. 235, 20 N.W. 205 (1884).
Statute with insufficient title
The legislature may validate a tax levied under a statute invalid only by reason of the insufficiency of its title.
Iowa—[Chicago, R.I. & P. Ry. Co. v. Rosenbaum](#), 212 Iowa 227, 231 N.W. 646 (1930).
Tenn.—[Cincinnati, N. O. & T. P. Ry. Co. v. Rhea County](#), 194 Tenn. 167, 250 S.W.2d 60 (1952).
Method of computation
Where county auditors, in computing the tax rate, failed to deduct from the total budget requirements the tax to be derived from moneys and credits in compliance with the statute, since the legislature had power in the first instance to provide for the method of computing tax rates by the auditors, after the lawful method had been ignored and an erroneous computation used, the legislature had power to legalize such error.
Iowa—[Cook v. Hannah](#), 230 Iowa 249, 297 N.W. 262 (1941).
Iowa—[Zaber v. City of Dubuque](#), 789 N.W.2d 634 (Iowa 2010).
Cal.—[Miller v. McKenna](#), 23 Cal. 2d 774, 147 P.2d 531 (1944).
Failure to give notice
The failure to give the owner of property requisite notice of an assessment or subsequent proceedings or of a tax sale, whether by advertisement or otherwise, is a jurisdictional defect and is not one which can be cured by the legislature.
Cal.—[Jones v. Walker](#), 47 Cal. App. 2d 566, 118 P.2d 299 (2d Dist. 1941).
Invalid creation of district
Compliance with a statute requiring a resolution of an intention to create an improvement district and give notice thereof is jurisdictional, and the failure to pass such a resolution cannot be cured by subsequent legislation.
Mont.—[Cooper v. City of Bozeman](#), 54 Mont. 277, 169 P. 801 (1917).
Fla.—[New Smyrna Inlet Dist. v. Esch](#), 103 Fla. 24, 137 So. 1 (1931).
Or.—[Kaddery v. City of Portland](#), 44 Or. 118, 74 P. 710 (1903).
Cal.—[Gottstein v. Gray](#), 66 Cal. App. 2d 587, 152 P.2d 742 (2d Dist. 1944).
Cal.—[Gaspard v. Edwin M. LeBaron, Inc.](#), 107 Cal. App. 2d 356, 237 P.2d 278 (2d Dist. 1951).
Transfer of tax title
A retrospective statute may validate a tax which is void for a failure to comply with any statutory requirement that the legislature may have originally dispensed with, but the power to validate a tax sale so as to make it

effectual to transfer a tax title is much more limited, and where taxation proceedings are so fatally defective that no title passes, the legislature cannot by a curative act transfer property from one person to another. Cal.—[Jones v. Walker](#), 47 Cal. App. 2d 566, 118 P.2d 299 (2d Dist. 1941).

9 U.S.—[Regla Coal Co. v. Bowers](#), 37 F.2d 373 (S.D. N.Y. 1929), [aff'd](#), 43 F.2d 679 (C.C.A. 2d Cir. 1930), [aff'd](#), 282 U.S. 409, 51 S. Ct. 186, 75 L. Ed. 415 (1931).

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16A C.J.S. Constitutional Law § 668

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

2. Proceedings of Municipalities

§ 668. Public improvements

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

An invalid contract for a public improvement may, in a proper case, be validated by curative legislation, and the legislature may validate a local improvement made without authority or an assessment therefor.

A contract for a public improvement which is invalid because all the legal formalities of awarding such a contract have not been complied with may, under proper circumstances, be validated by curative legislation.¹ While there is authority to the contrary,² it has been held that the legislature may validate a local improvement made by a municipality without authority.³ Although there is some dissent,⁴ it has also been held that a statute making valid an assessment for such improvement is constitutional.⁵

However, a statute attempting to validate an assessment which was void as a taking of property without due process, as where no sufficient provision as to notice and opportunity for hearing was made, is unconstitutional.⁶

CUMULATIVE SUPPLEMENT

Cases:

Supervisor's conduct in demanding that Commonwealth employee explain his absence from work and asking him for documents in presence of coworkers did not support employee's § 1983 claim for political discrimination in violation of the First Amendment; in the absence of contrary evidence, supervisor's role as employee's direct supervisor presumptively encompassed the authority to ask why he was absent and to demand documents for which he was responsible, and no rational jury could have concluded that challenged conduct would have deterred reasonably hardy individual from exercising constitutional rights. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983. [Santiago-Diaz v. Rivera-Rivera](#), 793 F.3d 195 (1st Cir. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ind.—[Yelton v. Plantz](#), 228 Ind. 79, 89 N.E.2d 540 (1950).
- 2 Cal.—[Fanning v. Schammel](#), 68 Cal. 428, 9 P. 427 (1886).
- 3 Iowa—[Richman v. Board of Sup'rs Muscatine County](#), 77 Iowa 513, 42 N.W. 422 (1889).
- 4 Cal.—[Fanning v. Schammel](#), 68 Cal. 428, 9 P. 427 (1886).
- 5 Pa.—[Donnelly v. City of Pittsburgh](#), 147 Pa. 348, 23 A. 394 (1892).
- 6 N.C.—[City of Lexington v. Lopp](#), 210 N.C. 196, 185 S.E. 766 (1936).

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16A C.J.S. Constitutional Law § 669

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

3. Transactions Between Private Persons

§ 669. Generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

While a legislature cannot validate a contract between private persons which is void because in violation of law, it may cure defects or irregularities in contracts between private persons by subsequent legislation.

Defects or irregularities in transactions between private persons which might otherwise be unenforceable for failure to comply with technical requirements may be cured by the legislature by retroactive statute.¹ Thus, the legislature may validate ultra vires contracts,² contracts of unregistered foreign corporations,³ and contracts invalid because of some omission or informality affecting the public alone or relating to a requirement intended for its protection.⁴

Such statutes merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions,⁵ and there is no injustice in retroactively depriving a person of a right that was created contrary to his or her expectations at the time he or she entered into the transaction from which the right arose.⁶ The legislature may not, however, by curative statutes, interfere with a vested right,⁷ or make contracts for parties who have made none,⁸ and thus cannot validate a contract which is void because in violation of law.⁹

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Footnotes

- 1 U.S.—*McNair v. Knott*, 302 U.S. 369, 58 S. Ct. 245, 82 L. Ed. 307 (1937); *Randall v. Kreiger*, 90 U.S. 137, 23 L. Ed. 124, 1874 WL 17470 (1874).
Minn.—*United Realty Trust v. Property Development & Research Co.*, 269 N.W.2d 737 (Minn. 1978).
Legislative power
The legislature, unless otherwise restricted by constitutional provision, has the power to enact curative laws for the enforcement of existing contracts, to cure defects in a remedy, confirm rights already existing, and add other means of securing and enforcing them.
Okla.—*McLain v. Oklahoma Cotton Growers' Ass'n*, 1927 OK 188, 125 Okla. 264, 258 P. 269 (1927).
- 2 U.S.—*McNair v. Knott*, 302 U.S. 369, 58 S. Ct. 245, 82 L. Ed. 307 (1937); *Gross v. U.S. Mortgage Co.*, 108 U.S. 477, 2 S. Ct. 940, 27 L. Ed. 795 (1883).
- 3 U.S.—*West Side Belt R Co v. Pittsburgh Const Co*, 219 U.S. 92, 31 S. Ct. 196, 55 L. Ed. 107 (1911).
- 4 U.S.—*McFaddin v. Evans-Snider-Buel Co.*, 185 U.S. 505, 22 S. Ct. 758, 46 L. Ed. 1012 (1902).
- 5 U.S.—*McNair v. Knott*, 302 U.S. 369, 58 S. Ct. 245, 82 L. Ed. 307 (1937).
Wash.—*Application of Santore*, 28 Wash. App. 319, 623 P.2d 702 (Div. 2 1981).
- 6 Wash.—*Application of Santore*, 28 Wash. App. 319, 623 P.2d 702 (Div. 2 1981).
- 7 Minn.—*United Realty Trust v. Property Development & Research Co.*, 269 N.W.2d 737 (Minn. 1978).
- 8 Ark.—*Ramey v. Pyles*, 182 Ark. 320, 31 S.W.2d 533 (1930).
- 9 N.C.—*Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970).

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

B. Curative Acts

3. Transactions Between Private Persons

§ 670. Deeds and other instruments

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Statutes](#)  1563

While a statute cannot cure an absolutely void instrument, a statute curing formal defects in deeds or other written instruments, or in their registration, is valid unless it cuts off intervening rights of innocent third persons.

Generally, the legislature may, within the constitutional limits of its power, cure formal defects in deeds and other written instruments, and give them the same validity as though they had been properly executed,¹ since such legislation, even though it may operate to cut off a right of action that would otherwise exist,² is not considered as depriving anyone of vested rights³ but rather as carrying into effect the intent of the parties.⁴

Such a statute, however, is invalid so far as it operates to cut off intervening rights of innocent third persons,⁵ or if it purports to validate an instrument which is absolutely void,⁶ as by a grantor totally lacking in power to make such a conveyance.⁷

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Footnotes

- 1 Colo.—*Farnik v. Board of County Com'rs of Weld County*, 139 Colo. 481, 341 P.2d 467 (1959).
- 2 Colo.—*Farnik v. Board of County Com'rs of Weld County*, 139 Colo. 481, 341 P.2d 467 (1959).
- 3 U.S.—*Randall v. Kreiger*, 90 U.S. 137, 23 L. Ed. 124, 1874 WL 17470 (1874).
 Colo.—*Farnik v. Board of County Com'rs of Weld County*, 139 Colo. 481, 341 P.2d 467 (1959).
 As to validation of defective deeds as impairment of vested rights, generally, see § 476.
- 4 Colo.—*Farnik v. Board of County Com'rs of Weld County*, 139 Colo. 481, 341 P.2d 467 (1959).
- 5 Ill.—*U.S. Mortgage Co. v. Gross*, 93 Ill. 483, 1879 WL 8639 (1879) (overruled in part on other grounds by, *Stevens v. Pratt*, 101 Ill. 206, 1881 WL 10704 (1881)) and *aff'd*, 108 U.S. 477, 2 S. Ct. 940, 27 L. Ed. 795 (1883).
Vested right in status
 Where, prior to the effective date of a curative statute, a purchase money deed of trust was of no effect because of the absence of an affidavit of disbursement, persons secured by other deeds of trust had a vested right in the status which each had, and thus, it would be constitutionally impermissible to apply the curative statute, which purported to validate the deeds of trust where the affidavit was inadvertently omitted, where such application would place persons secured by other deeds of trust in a lower order of priority.
 Md.—*Dryfoos v. Hostetter*, 268 Md. 396, 302 A.2d 28 (1973).
- 6 N.Y.—*Thomas v. Loomis*, 273 A.D. 680, 80 N.Y.S.2d 309 (4th Dep't 1948).
- 7 Ala.—*Horton v. Carter*, 253 Ala. 325, 45 So. 2d 10 (1950).

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16A C.J.S. Constitutional Law II VII C Refs.

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

[Topic Summary](#) | [Correlation Table](#)

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law

A.L.R. Index, Ex Post Facto Laws

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16A C.J.S. Constitutional Law § 671

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

1. In General

§ 671. Definition of ex post facto law

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2781, 2789

An ex post facto law is one which, operating retrospectively and on penal or criminal matters only, renders a previously innocent act criminal; aggravates, or increases the punishment for, a crime; alters the rules of evidence; penalizes an innocent act while assuming to regulate civil rights and remedies; deprives an accused of some protection or defense previously available; or alters his or her situation to his or her disadvantage.

It is essential to an ex post facto law that it be retroactive in its operation.¹ However, there is a difference between an ex post facto law and a mere retroactive law, and not all retroactive laws are ex post facto laws.² An ex post facto law may be one which generally, in relation to the offense or its consequences, alters the situation of an accused to his or her material³ disadvantage.⁴ More specifically, an ex post facto law is one which makes criminal and punishes an act which was done before the passage of the law and which was innocent when done,⁵ aggravates a crime or makes it greater than it was when committed,⁶ changes the punishment and inflicts a greater punishment than was prescribed when the crime was committed,⁷ alters the legal rules of evidence and receives less or different evidence than was required to convict at the time the offense was committed,⁸ or deprives the defendant of a substantial right or immunity he or she possessed at the time of the offense.⁹ However, a law need

not impair a vested right to violate the ex post facto prohibition.¹⁰ In any event, a statute does not violate the prohibition unless it materially impairs the right of the accused to have the question of his or her guilt determined according to the law as it was when the offense was committed.¹¹

It is the effect,¹² not the form,¹³ of the law which determines whether it is ex post facto, and a statute is not retroactive in operation, and thus an ex post facto law, merely because it draws upon facts antecedent to its enactment for its operation.¹⁴ In analyzing the effects of a law for purpose of ex post facto analysis, relevant factors include whether, in its necessary operation, the regulatory scheme has been regarded in our history and traditions as a punishment; whether it imposes an affirmative disability or restraint; whether it promotes the traditional aims of punishment; and whether it has a rational connection to a nonpunitive purpose or is excessive with respect to this purpose.¹⁵

Under some circumstances, whether a statute violates the ex post facto prohibition depends on whether the legislative aim was to punish past activity or whether the restriction is a relevant incident to the regulation of a present situation.¹⁶ Accordingly, a law which depends upon prior conduct is not ex post facto if proof of the prior conduct is restricted to proof of some general characteristic that currently exists, such as untrustworthiness or incorrigibility,¹⁷ and at least in the felony disability area, the purpose of a law is essentially regulatory rather than punitive.¹⁸

Political subdivisions; administrative rules and regulations.

Political subdivisions of a state,¹⁹ or quasilegislative instrumentalities,²⁰ exercising delegated legislative power are within the ambit of the Ex Post Facto Clause. Moreover, when a legislature has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for the purposes of the Ex post Facto Clause,²¹ and administrative regulations, like statutes, are covered by the Ex Post Facto Clause.²² Under other authority, however, it has been held that the ex post facto operation of laws refers only to statutory or constitutional provisions and not to any administrative rules and regulations.²³

CUMULATIVE SUPPLEMENT

Cases:

Ex post facto clause of the Constitution prohibits retroactive application of penal legislation. [U.S.C.A. Const. Art. 1, § 10, cl. 1](#). [Bank Markazi v. Peterson](#), 136 S. Ct. 1310 (2016).

A statute will be considered an ex post facto law if it punishes as a crime an act previously committed, which was innocent when done, makes more burdensome the punishment for a crime, after its commission, or deprives one charged with crime of any defense available according to law at the time when the act was committed. [U.S. Const. art. 1, § 10, cl. 1](#). [People v. Mowring](#), 64 Misc. 3d 900, 105 N.Y.S.3d 290 (N.Y. City Crim. Ct. 2019).

Two critical elements must be met for a criminal or penal law to be deemed ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [U.S. Const., art. 1, § 10](#); [Pa. Const. art. 1, § 17](#). [Commonwealth v. Muniz](#), 164 A.3d 1189 (Pa. 2017).

[END OF SUPPLEMENT]

Footnotes

- 1 [§ 672.](#)
- 2 [Cal.—People v. Sobiek, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519, 82 A.L.R.3d 804 \(1st Dist. 1973\).](#)
[Mont.—State v. Coleman, 185 Mont. 299, 605 P.2d 1000 \(1979\).](#)
Act not ex post facto although retrospective
[Pa.—Statler v. U.S. Savings & Trust Co. of Conemaugh, 122 Pa. Super. 189, 186 A. 290 \(1936\), aff'd, 326 Pa. 247, 192 A. 250 \(1937\).](#)
A.L.R. Library
[Mandatory Victims Restitution Act—Constitutional Issues, 20 A.L.R. Fed. 2d 239.](#)
- 3 [U.S.—Rooney v. State of North Dakota, 196 U.S. 319, 25 S. Ct. 264, 49 L. Ed. 494 \(1905\).](#)
[Mo.—State v. Morton, 338 S.W.2d 858 \(Mo. 1960\).](#)
[N.J.—State v. Johns, 111 N.J. Super. 574, 270 A.2d 59 \(App. Div. 1970\).](#)
- 4 [U.S.—In re Medley, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 \(1890\).](#)
[Mont.—Wright v. Mahoney, 2003 MT 141, 316 Mont. 173, 71 P.3d 1195 \(2003\).](#)
[Neb.—State v. Gales, 265 Neb. 598, 658 N.W.2d 604 \(2003\).](#)
[Pa.—Lehman v. Pennsylvania State Police, 576 Pa. 365, 839 A.2d 265 \(2003\).](#)
[Tenn.—State v. Odom, 137 S.W.3d 572 \(Tenn. 2004\).](#)
Altering standard of punishment
The sole determination of whether a law is "disadvantageous," for ex post facto purposes, is whether it alters the standard of punishment which existed under prior law.
[W. Va.—Hensler v. Cross, 210 W. Va. 530, 558 S.E.2d 330 \(2001\).](#)
- 5 [U.S.—Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 \(1990\).](#)
[Alaska—Hertz v. Carothers, 225 P.3d 571 \(Alaska 2010\).](#)
[Ark.—Lard v. State, 2014 Ark. 1, 431 S.W.3d 249 \(2014\), petition for certiorari filed, 135 S. Ct. 76, 190 L. Ed. 2d 67 \(2014\).](#)
[Cal.—In re Edward C., 223 Cal. App. 4th 813, 167 Cal. Rptr. 3d 536 \(1st Dist. 2014\), review denied, \(May 14, 2014\).](#)
[Fla.—Shenfeld v. State, 44 So. 3d 96 \(Fla. 2010\).](#)
[Kan.—State v. Gleason, 299 Kan. 1127, 329 P.3d 1102 \(2014\).](#)
[Minn.—Hankerson v. State, 723 N.W.2d 232 \(Minn. 2006\).](#)
[N.H.—In re Evans, 154 N.H. 142, 908 A.2d 796 \(2006\).](#)
- 6 [Ark.—Lard v. State, 2014 Ark. 1, 431 S.W.3d 249 \(2014\), petition for certiorari filed, 135 S. Ct. 76, 190 L. Ed. 2d 67 \(2014\).](#)
[Cal.—In re Edward C., 223 Cal. App. 4th 813, 167 Cal. Rptr. 3d 536 \(1st Dist. 2014\), review denied, \(May 14, 2014\).](#)
[Fla.—Shenfeld v. State, 44 So. 3d 96 \(Fla. 2010\).](#)
[Kan.—State v. Barnes, 278 Kan. 121, 92 P.3d 578 \(2004\).](#)
[N.H.—In re Evans, 154 N.H. 142, 908 A.2d 796 \(2006\).](#)
[Tenn.—State v. Odom, 137 S.W.3d 572 \(Tenn. 2004\).](#)
- 7 [U.S.—Peugh v. U.S., 133 S. Ct. 2072, 186 L. Ed. 2d 84 \(2013\).](#)
[Alaska—Hertz v. Carothers, 225 P.3d 571 \(Alaska 2010\).](#)
[Cal.—In re Edward C., 223 Cal. App. 4th 813, 167 Cal. Rptr. 3d 536 \(1st Dist. 2014\), review denied, \(May 14, 2014\).](#)
[Fla.—Shenfeld v. State, 44 So. 3d 96 \(Fla. 2010\).](#)
[Ga.—Chandler v. State, 281 Ga. 712, 642 S.E.2d 646 \(2007\).](#)
[Kan.—State v. Gleason, 299 Kan. 1127, 329 P.3d 1102 \(2014\).](#)
[Minn.—Hankerson v. State, 723 N.W.2d 232 \(Minn. 2006\).](#)
[N.H.—In re Evans, 154 N.H. 142, 908 A.2d 796 \(2006\).](#)
Laws increasing punishment as ex post facto laws, generally, see §§ 681 to 687.
- 8 [Cal.—In re Edward C., 223 Cal. App. 4th 813, 167 Cal. Rptr. 3d 536 \(1st Dist. 2014\), review denied, \(May 14, 2014\).](#)
[Fla.—Shenfeld v. State, 44 So. 3d 96 \(Fla. 2010\).](#)

- 9 Ga.—[Chandler v. State](#), 281 Ga. 712, 642 S.E.2d 646 (2007).
- Tenn.—[State v. Odom](#), 137 S.W.3d 572 (Tenn. 2004).
- Utah—[State v. Mauchley](#), 2003 UT 10, 67 P.3d 477 (Utah 2003).
- Ga.—[Chandler v. State](#), 281 Ga. 712, 642 S.E.2d 646 (2007).
- Laws depriving accused of substantial right or immunity as ex post facto laws, generally, see §§ 688, 689.
- Depriving defendant of defense available when crime committed**
- U.S.—[Collins v. Youngblood](#), 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).
- Alaska—[Hertz v. Carothers](#), 225 P.3d 571 (Alaska 2010).
- Idaho—[State v. Forbes](#), 152 Idaho 849, 275 P.3d 864 (2012).
- Kan.—[State v. Gleason](#), 299 Kan. 1127, 329 P.3d 1102 (2014).
- Minn.—[Hankerson v. State](#), 723 N.W.2d 232 (Minn. 2006).
- N.Y.—[Kellogg v. Travis](#), 100 N.Y.2d 407, 764 N.Y.S.2d 376, 796 N.E.2d 467 (2003).
- Wash.—[In re Forbis](#), 150 Wash. 2d 91, 74 P.3d 1189 (2003).
- 10 U.S.—[Weaver v. Graham](#), 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).
- La.—[State v. Curtis](#), 363 So. 2d 1375 (La. 1978).
- 11 N.Y.—[People v. Martinez](#), 82 Misc. 2d 56, 368 N.Y.S.2d 699 (Sup 1975).
- 12 U.S.—[Weaver v. Graham](#), 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).
- Pa.—[Cimaszewski v. Board of Probation and Parole](#), 582 Pa. 27, 868 A.2d 416 (2005).
- 13 U.S.—[Weaver v. Graham](#), 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).
- Pa.—[Cimaszewski v. Board of Probation and Parole](#), 582 Pa. 27, 868 A.2d 416 (2005).
- 14 § 672.
- 15 U.S.—[Smith v. Doe](#), 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).
- 16 U.S.—[De Veau v. Braisted](#), 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960).
- N.Y.—[Springer v. Whalen](#), 68 A.D.2d 1011, 415 N.Y.S.2d 106 (3d Dep't 1979).
- 17 U.S.—[U.S. v. Bell](#), 371 F. Supp. 220 (E.D. Tex. 1973).
- 18 U.S.—[U.S. v. Bell](#), 371 F. Supp. 220 (E.D. Tex. 1973).
- 19 U.S.—[U. S. ex rel. Almeida v. Rundle](#), 255 F. Supp. 936 (E.D. Pa. 1966), order aff'd, 383 F.2d 421 (3d Cir. 1967).
- Kan.—[Stansbury v. Hannigan](#), 265 Kan. 404, 960 P.2d 227 (1998).
- Municipal corporations**
- The word "State," in the Federal Constitution, includes municipal corporations, which are prohibited from enacting ex post facto legislation.
- Ohio—[Clark v. City of Cincinnati](#), 54 Ohio Op. 200, 69 Ohio L. Abs. 202, 121 N.E.2d 834 (C.P. 1954), rev'd on other grounds, 99 Ohio App. 152, 58 Ohio Op. 265, 131 N.E.2d 599 (1st Dist. Hamilton County 1954), judgment aff'd, 163 Ohio St. 532, 56 Ohio Op. 438, 127 N.E.2d 363 (1955).
- 20 U.S.—[U. S. ex rel. Almeida v. Rundle](#), 255 F. Supp. 936 (E.D. Pa. 1966), order aff'd, 383 F.2d 421 (3d Cir. 1967).
- 21 U.S.—[Rodriguez v. U.S. Parole Commission](#), 594 F.2d 170 (7th Cir. 1979).
- 22 U.S.—[Allen v. Hadden](#), 536 F. Supp. 586 (D. Colo. 1982), judgment aff'd, 723 F.2d 59 (10th Cir. 1983).
- 23 Okla.—[Spence v. Page](#), 1969 OK CR 12, 449 P.2d 717 (Okla. Crim. App. 1969).

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

1. In General

§ 672. Retroactivity of ex post facto laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2781, 2789

For a law to be considered an ex post facto law, it must be retroactive in its operation. A statute is ex post facto as to an offense only if it is passed, or takes effect, or is amended after the commission thereof.

It is essential to an ex post facto law that it be retroactive in its operation.¹ Thus, a statute is ex post facto as to an offense only if it is passed,² or takes effect,³ or is amended⁴ after the commission thereof, and an enactment whose operation is entirely prospective is not an ex post facto law.⁵ It is the law on the date of the crime, rather than on the date of the trial, conviction, sentencing, or original commitment, that is significant to an ex post facto determination.⁶

A statute is not retroactive in operation, and thus an ex post facto law, merely because it draws upon facts antecedent to its enactment for its operation.⁷

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Footnotes

- 1 U.S.—*Lynce v. Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997); U.S. v. *Kumar*, 617 F.3d 612 (2d Cir. 2010); *Guangdong Wireking Housewares & Hardware Co., Ltd. v. U.S.*, 745 F.3d 1194 (Fed. Cir. 2014).
Cal.—*People v. Sandoval*, 41 Cal. 4th 825, 62 Cal. Rptr. 3d 588, 161 P.3d 1146 (2007).
Ill.—*People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 330 Ill. Dec. 761, 909 N.E.2d 783 (2009).
Mont.—*Wright v. Mahoney*, 2003 MT 141, 316 Mont. 173, 71 P.3d 1195 (2003).
Vt.—*In re Blow*, 194 Vt. 416, 2013 VT 75, 82 A.3d 554 (2013).
As to retrospective laws, generally, see §§ 645 to 660.
Clarification of law not an ex post facto determination
Cal.—*People v. Sobiek*, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519, 82 A.L.R.3d 804 (1st Dist. 1973).
2 U.S.—*Samuels v. McCurdy*, 267 U.S. 188, 45 S. Ct. 264, 69 L. Ed. 568, 37 A.L.R. 1378 (1925).
Cal.—*Dewoody v. Superior Court*, 8 Cal. App. 3d 52, 87 Cal. Rptr. 210 (3d Dist. 1970).
Appointment of parole board after offense
A law authorizing the appointment of a parole commission, enacted prior to the commission of the offense, was not ex post facto as to such offense although the board was not appointed until after the offense was committed.
N.Y.—*People ex rel. Cezosie v. Warden of New York County Penitentiary*, 223 N.Y. 307, 119 N.E. 564 (1918).
3 Fla.—*Rodriguez v. State*, 380 So. 2d 1123 (Fla. 2d DCA 1980).
Time of sentencing
A statutory provision in force at the time of sentencing, and not changed by subsequent amendments, is not an ex post facto law.
N.Y.—*People ex rel. Schlecter v. Jennings*, 130 Misc. 748, 226 N.Y.S. 98 (Sup 1927), *aff'd*, 223 A.D. 814, 227 N.Y.S. 874 (4th Dep't 1928).
4 Cal.—*People v. Dawson*, 210 Cal. 366, 292 P. 267 (1930).
Prior law
An amended law is not ex post facto as to a defendant who is prosecuted under the law as it was prior to its amendment.
Cal.—*People v. Newell*, 192 Cal. 659, 221 P. 622 (1923).
5 U.S.—*Murphy v. Com. of Massachusetts*, 177 U.S. 155, 20 S. Ct. 639, 44 L. Ed. 711 (1900).
Mo.—*Lincoln Credit Co. v. Peach*, 636 S.W.2d 31 (Mo. 1982).
Nev.—*Woods v. State*, 2013 WL 7156337 (Nev. 2013).
Charging offenses before and after statute
A statute whose provisions relate wholly to the future is not rendered ex post facto by the fact that an indictment thereunder erroneously charges offenses both before and after its effective date.
Va.—*Morgan v. Commonwealth*, 98 Va. 812, 35 S.E. 448 (1900).
6 N.C.—*State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979).
Wash.—*Johnson v. Morris*, 87 Wash. 2d 922, 557 P.2d 1299 (1976).
7 U.S.—*U.S. v. Bally Mfg. Corp.*, 345 F. Supp. 410 (E.D. La. 1972).
Mont.—*State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979).
Tex.—*Mont Belvieu Caverns, LLC v. Texas Com'n on Environmental Quality*, 382 S.W.3d 472 (Tex. App. Austin 2012).

16A C.J.S. Constitutional Law § 673

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PART II. Vested Rights and Retroactive Legislation

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C. Ex Post Facto Laws

1. In General

§ 673. Prohibition against ex post facto laws generally inapplicable to judicial acts

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2788(4)

The prohibition against ex post facto laws ordinarily applies to legislative acts only, and not to judicial acts, but an unforeseeable judicial enlargement of a criminal statute, applied retroactively, may operate precisely like an ex post facto law.

The ex post facto clauses of the federal constitution and of some state constitutions do not of its own force apply to the judicial branch of government.¹ The prohibition against ex post facto laws ordinarily applies to legislative acts only, and not to judicial acts,² as where the courts construe or interpret laws.³ Thus, for purposes of the prohibition against ex post facto laws, it is irrelevant whether a decision is "judicial" or "legislative" in a descriptive sense since the prohibition does not apply to decisions rendered by courts as an institutional matter.⁴ Nevertheless, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law,⁵ and it has been held that even where a judicial interpretation of a statute does not expand the reach of the statute in an extreme and unpredictable way, its retroactive application is inappropriate without substantial justification outweighing the ex post facto considerations.⁶ On the other hand, it has been said that while

changing the law by judicial construction, such as overturning prior case law, requires consideration of ex post facto principles, it implicates the due process clause.⁷

Under a variety of facts and circumstances, the courts have adjudicated particular judicial constructions, interpretations, or applications of statutes or court rules not to be in the nature of ex post facto lawmaking,⁸ or the creation of ex post facto law by judicial enlargement,⁹ as where the holding was predictable in the light of other decisions¹⁰ and there was no novel,¹¹ unprecedented,¹² and/or unforeseeable¹³ judicial enlargement of the statute¹⁴ or expansion of the statutory language¹⁵ or where the holding was not otherwise the type of radical, unforeseeable departure from prior laws that would implicate the Ex Post Facto Clause.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Technically, constitutional ex post facto clauses do not concern judicial decisions; they are limitations upon the powers of the Legislature, and do not of their own force apply to the Judicial Branch of government. U.S. Const. art. 1, § 10; [Neb. Const. art. 1, § 16](#). [Caton v. State](#), 291 Neb. 939, 869 N.W.2d 911 (2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Rogers v. Tennessee](#), 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001); [Ruhlman v. Brunzman](#), 664 F.3d 615 (6th Cir. 2011).
Conn.—[Washington v. Commissioner of Correction](#), 287 Conn. 792, 950 A.2d 1220 (2008).
Ind.—[Armstrong v. State](#), 848 N.E.2d 1088 (Ind. 2006).
Okla.—[Barnett v. State](#), 2012 OK CR 2, 271 P.3d 80 (Okla. Crim. App. 2012).
- 2 Cal.—[People v. Sandoval](#), 41 Cal. 4th 825, 62 Cal. Rptr. 3d 588, 161 P.3d 1146 (2007).
Fla.—[Mayes v. Moore](#), 827 So. 2d 967 (Fla. 2002).
Neb.—[State v. Davlin](#), 263 Neb. 283, 639 N.W.2d 631 (2002).
Tex.—[Blue v. State](#), 125 S.W.3d 491 (Tex. Crim. App. 2003).
By terms of clause
The ex post facto clause does not, by its own terms, apply to judicial decisions.
Tenn.—[State v. Carter](#), 114 S.W.3d 895 (Tenn. 2003).
- 3 Ga.—[Cofer v. Crowell](#), 146 Ga. App. 639, 247 S.E.2d 152 (1978).
Mo.—[Rogers v. State](#), 625 S.W.2d 185 (Mo. Ct. App. E.D. 1981).
- 4 U.S.—[U.S. v. Treadwell](#), 593 F.3d 990 (9th Cir. 2010).
- 5 U.S.—[Bouie v. City of Columbia](#), 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).
Fla.—[Mayes v. Moore](#), 827 So. 2d 967 (Fla. 2002).
Lack of fair warning
The interpretation of a statute by a court may add clarifying gloss to otherwise unclear words and thereby provide constructive notice to future defendants, but have the effect of an ex post facto law as to the present defendant, in the sense that he or she did not have fair warning that his or her contemplated conduct constitutes a crime.
Mich.—[People v. Dempster](#), 396 Mich. 700, 242 N.W.2d 381, 19 U.C.C. Rep. Serv. 845, 84 A.L.R.3d 562 (1976).
- 6 U.S.—[U.S. v. Wasserman](#), 504 F.2d 1012 (5th Cir. 1974).

- 7 Okla.—*Warner v. State*, 2006 OK CR 40, 144 P.3d 838 (Okla. Crim. App. 2006).
- 8 Cal.—*Chambers v. Municipal Court*, 65 Cal. App. 3d 904, 135 Cal. Rptr. 695 (1st Dist. 1977).
Del.—*Fountain v. State*, 450 A.2d 385 (Del. 1982).
- 9 Ky.—*Kentucky Bar Ass'n v. Kramer*, 555 S.W.2d 245 (Ky. 1977).
- 10 Ky.—*Helpenstine v. Com.*, 566 S.W.2d 415 (Ky. 1978) (overruled on other grounds by, *Wilburn v. Com.*, 312 S.W.3d 321 (Ky. 2010)).
In line with weight of authority across country
Mont.—*State v. Duncan*, 181 Mont. 382, 593 P.2d 1026 (1979).
- 11 Cal.—*Chambers v. Municipal Court*, 65 Cal. App. 3d 904, 135 Cal. Rptr. 695 (1st Dist. 1977).
- 12 Mont.—*State v. Duncan*, 181 Mont. 382, 593 P.2d 1026 (1979).
- 13 Ky.—*Helpenstine v. Com.*, 566 S.W.2d 415 (Ky. 1978) (overruled on other grounds by, *Wilburn v. Com.*, 312 S.W.3d 321 (Ky. 2010)).
Mont.—*State v. Duncan*, 181 Mont. 382, 593 P.2d 1026 (1979).
- 14 U.S.—*U.S. v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975).
Ky.—*Helpenstine v. Com.*, 566 S.W.2d 415 (Ky. 1978) (overruled on other grounds by, *Wilburn v. Com.*, 312 S.W.3d 321 (Ky. 2010)).
- 15 Cal.—*Chambers v. Municipal Court*, 65 Cal. App. 3d 904, 135 Cal. Rptr. 695 (1st Dist. 1977).
Mont.—*State v. Duncan*, 181 Mont. 382, 593 P.2d 1026 (1979).
- 16 U.S.—*U.S. v. Wilder*, 680 F.2d 59 (9th Cir. 1982).

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16A C.J.S. Constitutional Law § 674

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

1. In General

§ 674. Constitutionality of ex post facto laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2782 to 2784

An ex post facto law which punishes only offenses committed before its passage is wholly void, but a law may be void on this ground as to past offenses and valid as to future ones.

A provision of the Federal Constitution prohibits the enactment of ex post facto laws by Congress¹ while another provision thereof² prohibits the enactment of such laws by the states.³ The prohibition of the enactment of ex post facto laws was first written into the Constitution of the United States and since that time has been incorporated into the organic law of every state.⁴ State and federal constitutional provisions prohibiting ex post facto laws are virtually identical and substantially equivalent,⁵ and the protection afforded against ex post facto penal laws under both the federal and state constitutions is the same.⁶ Furthermore, state courts interpret an ex post facto clause in a state constitution no differently than its federal counterpart,⁷ and in interpreting the ex post facto prohibition in a state constitution, state courts look to the United States Supreme Court's interpretation of the ex post facto prohibition in the Federal Constitution.⁸

Ex post facto constitutional provisions are a limitation upon the actions of the legislature.⁹ However, a law does not run afoul of the Ex Post Facto Clause unless it retroactively alters the definition of criminal conduct or increases the penalty by which a crime is punishable.¹⁰ Where only offenses committed prior to its passage are to be punished under a law, it is wholly void,¹¹ but a law which is ex post facto as to such offenses may be valid as to all offenses committed thereafter.¹² Furthermore, under the Ex Post Facto Clause, a novel interpretation of statutory language may be upheld but not as applied to conduct taking place before its first iteration.¹³

Purpose or function of constitutional prohibition.

One of the principal interests that the Ex Post Facto Clause was designed to serve was fundamental justice.¹⁴ Through the ex post facto prohibition, the framers of the Constitution sought to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.¹⁵ Furthermore, the prohibition is intended to secure substantial personal rights against arbitrary, vindictive, or oppressive legislation¹⁶ and to protect a transgressor of a penal statute from being subjected by subsequent legislation to any penalty, liability, or consequence that was not attached to the transgression when it accrued.¹⁷

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Footnotes

- 1 U.S. Const. Art. I, § 9, cl. 3.
- 2 U.S. Const. Art. I, § 10, cl. 1.
- 3 U.S.—*Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003).
Kan.—*City of Norton v. Hurt*, 275 Kan. 521, 66 P.3d 870 (2003).
Wash.—*In re LaChapelle*, 153 Wash. 2d 1, 100 P.3d 805 (2004).
- 4 Wash.—*In re LaChapelle*, 153 Wash. 2d 1, 100 P.3d 805 (2004).
Wyo.—*Snyder v. State*, 912 P.2d 1127 (Wyo. 1996).
- 5 La.—*Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001).
Same meaning
Md.—*Khalifa v. State*, 382 Md. 400, 855 A.2d 1175 (2004).
Same definition
N.C.—*State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002).
- 6 Cal.—*In re Vicks*, 56 Cal. 4th 274, 153 Cal. Rptr. 3d 471, 295 P.3d 863 (2013), cert. denied, 134 S. Ct. 283, 187 L. Ed. 2d 205 (2013).
N.H.—*State v. Comeau*, 142 N.H. 84, 697 A.2d 497 (1997).
At least as much protection
A state ex post facto law provides at least as much protection as its federal counterpart.
N.J.—*State v. Fortin*, 178 N.J. 540, 843 A.2d 974 (2004), as clarified on other grounds, (Feb. 6, 2004).
No greater protection
A state constitution's ex post facto clause does not provide any greater protection than that offered by the Federal Constitution.
Ill.—*People v. Cornelius*, 213 Ill. 2d 178, 290 Ill. Dec. 237, 821 N.E.2d 288 (2004).
Neb.—*Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).
- 7 Alaska—*State v. Coon*, 974 P.2d 386, 95 A.L.R.5th 729 (Alaska 1999).
Cal.—*People v. Castellanos*, 21 Cal. 4th 785, 88 Cal. Rptr. 2d 346, 982 P.2d 211 (1999).
- 8 Ill.—*Hill v. Walker*, 241 Ill. 2d 479, 350 Ill. Dec. 321, 948 N.E.2d 601 (2011).
Wis.—*State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).
Persuasive authority
Cal.—*People v. Snook*, 16 Cal. 4th 1210, 69 Cal. Rptr. 2d 615, 947 P.2d 808 (1997).
- 9 Pa.—*Com. v. Hoetzel*, 284 Pa. Super. 623, 426 A.2d 669 (1981).

- 10 U.S.—*U.S. v. Lennon*, 372 F.3d 535 (3d Cir. 2004).
- 11 U.S.—*Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866); *South East Chicago Commission v. Department of Housing and Urban Development*, 488 F.2d 1119 (7th Cir. 1973).
- 12 La.—*State v. Masino*, 216 La. 352, 43 So. 2d 685, 14 A.L.R.2d 720 (1949).
- 13 U.S.—*U.S. v. Hussein*, 351 F.3d 9 (1st Cir. 2003).
- 14 U.S.—*Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).
- 15 U.S.—*Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).
- Conn.—*State v. Courchesne*, 296 Conn. 622, 998 A.2d 1 (2010).
- Md.—*Secretary, Dept. of Public Safety and Correctional Services v. Demby*, 390 Md. 580, 890 A.2d 310 (2006).
- Neb.—*State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).
- N.J.—*State v. Fortin*, 198 N.J. 619, 969 A.2d 1133 (2009).
- Notice test**
- If legislation must pass a notice test to escape ex post facto condemnation, the public is charged with knowledge of all published information concerning a congressional bill which is available during the entire legislative process; actual notice to a particular individual that legislation has passed or is about to be passed or approved is not a prerequisite to the application of an act as against ex post facto condemnation.
- U.S.—*U.S. v. Casson*, 434 F.2d 415 (D.C. Cir. 1970).
- A.L.R. Library**
- Application of Fair Warning Requirement of Due Process Clause to State Death Penalty Proceedings Premised upon Retroactive Application of Case Law*, 93 A.L.R.6th 391.
- 16 U.S.—*Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).
- Ark.—*Lard v. State*, 2014 Ark. 1, 431 S.W.3d 249 (2014), petition for certiorari filed, 135 S. Ct. 76, 190 L. Ed. 2d 67 (2014).
- Md.—*Secretary, Dept. of Public Safety and Correctional Services v. Demby*, 390 Md. 580, 890 A.2d 310 (2006).
- Legislation aimed at disfavored groups**
- The Ex Post Facto Clause of the Federal Constitution prevents the legislature from abusing its authority by enacting arbitrary or vindictive legislation aimed at disfavored groups.
- Ohio—*State v. Cook*, 83 Ohio St. 3d 404, 1998-Ohio-291, 700 N.E.2d 570 (1998).
- 17 N.H.—*State v. Lambert*, 119 N.H. 881, 409 A.2d 794 (1979).

16A C.J.S. Constitutional Law § 675

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

1. In General

§ 675. Application of ex post facto laws to civil rights or remedies

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2789 to 2793

Civil rights or remedies are not within the prohibition of ex post facto laws.

When analyzing a claim under either the ex post facto clause, the threshold question is whether the challenged action is a criminal or civil action.¹ The constitutional prohibition of the passage of ex post facto laws applies only to criminal or penal matters.² Thus, the prohibition does not apply or have reference to laws which concern civil matters or proceedings generally,³ such as statutes relating to criminal psychopaths⁴ or laws affecting aliens.⁵ A criminal law, in the context of the constitutional prohibition of ex post facto laws, is one that carries a sanction that is criminal, as opposed to civil, in nature.⁶

The ex post facto prohibition also does not apply to matters or proceedings which affect or regulate civil or private rights,⁷ such as laws concerning divorce,⁸ or disciplinary and disbarment proceedings.⁹ Likewise, the constitutional prohibition does not apply to laws affecting civil remedies.¹⁰ While there is authority that insanity laws are civil matters to which the ex post facto prohibition does not apply,¹¹ there is also authority that the ex post facto prohibition applies at a "civil" proceeding to determine

whether a defendant should be released from a mental health facility to which he or she has been committed following a plea of not guilty by reason of insanity.¹²

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Footnotes

- 1 Wis.—*In re Commitment of Rachel*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762 (2002).
 - 2 U.S.—*Galvan v. Press*, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).
Idaho—*Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 207 P.3d 988 (2009).
Mass.—*Police Dept. of Salem v. Sullivan*, 460 Mass. 637, 953 N.E.2d 188 (2011).
Neb.—*Shepard v. Houston*, 289 Neb. 399, 855 N.W.2d 559 (2014).
Okla.—*Starkey v. Oklahoma Dept. of Corrections*, 2013 OK 43, 305 P.3d 1004 (Okla. 2013).
 - 3 Idaho—*Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 207 P.3d 988 (2009).
Neb.—*Shepard v. Houston*, 289 Neb. 399, 855 N.W.2d 559 (2014).
Utah—*In re Discipline of Ennenga*, 2001 UT 111, 37 P.3d 1150 (Utah 2001).
Wis.—*In re Commitment of Rachel*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762 (2002).
As to retrospective laws applicable to civil matters, generally, see §§ 645 to 660.
- Challenge for vagueness**
- A civil statute that does not impose a criminal penalty cannot be challenged for vagueness, under the constitutional provision prohibiting ex post facto laws.
- 4 Or.—*Delgado v. Souders*, 334 Or. 122, 46 P.3d 729 (2002).
 - 5 N.H.—*In re Moulton*, 96 N.H. 370, 77 A.2d 26 (1950).
 - 6 U.S.—*Marcello v. Bonds*, 349 U.S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 (1955); *Galvan v. Press*, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).
 - 7 Or.—*Delgado v. Souders*, 334 Or. 122, 46 P.3d 729 (2002).
 - 8 S.C.—*McMaster v. South Carolina Retirement System*, 362 S.C. 362, 608 S.E.2d 843 (2005).
 - 9 Iowa—*In Interest of Ponx*, 276 N.W.2d 425 (Iowa 1979).
 - 10 Md.—*Dodrer v. Dodrer*, 183 Md. 413, 37 A.2d 919 (1944).
 - Mass.—*Arthurs v. Board of Registration in Medicine*, 383 Mass. 299, 418 N.E.2d 1236, 22 A.L.R.4th 651 (1981).
 - Wis.—*JED Const. Co., Inc. v. Lilly*, 208 Neb. 607, 305 N.W.2d 1 (1981).
 - U.S.—*Portley v. Grossman*, 444 U.S. 1311, 100 S. Ct. 714, 62 L. Ed. 2d 723 (1980).
 - N.J.—*Matter of Garay*, 89 N.J. 104, 444 A.2d 1107, 32 A.L.R.4th 658 (1982).
- Enforcement of support proceedings**
- Enforcement of support acts were not enacted to make failure to support one's children a crime, and do not create new offenses, but are merely procedural steps that relate only to a current duty to support and are therefore not violative of the constitutional prohibition against ex post facto laws.
- Cal.—*Smith v. Smith*, 131 Cal. App. 2d 764, 281 P.2d 274 (4th Dist. 1955).
 - 11 Ga.—*Bailey v. State*, 210 Ga. 52, 77 S.E.2d 511 (1953).
- Extension of commitment**
- The extension of a criminally insane defendant's commitment did not violate the ex post facto clause of the constitution since the extension was not criminal punishment but was for treatment in a state hospital.
- Cal.—*People v. Buttes*, 134 Cal. App. 3d 116, 184 Cal. Rptr. 497 (5th Dist. 1982).
 - 12 Md.—*Bergstein v. State*, 76 Md. App. 554, 547 A.2d 668 (1988).

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16A C.J.S. Constitutional Law § 676

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

1. In General

§ 676. Application of ex post facto laws to civil rights or remedies—Determination of whether penalty civil or criminal

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2789 to 2793

The first level of inquiry in determining whether a particular statutorily defined penalty is civil or criminal is whether the legislature has indicated an intention to establish a civil or criminal penalty, and when a statute promotes the traditional aims of punishment, retribution, and deterrence, its effect is more likely to be considered punitive, for purposes of determining whether the statute violates the ex post facto clauses of the state and federal constitutions, but the existence of a deterrent effect alone will generally be insufficient to transform a civil sanction into a criminal one.

Whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.¹ When a statute promotes the traditional aims of punishment, retribution, and deterrence, its effect is more likely to be considered punitive, for purposes of determining whether the statute violates the ex post facto clauses of the state and federal constitutions, but the existence of a deterrent effect alone will generally be insufficient to transform a civil sanction into a criminal one.² A statute that applies to behavior that is already a crime is more likely to be characterized as a criminal sanction for ex post facto purposes.³

In considering whether a law constitutes retroactive punishment forbidden by the ex post facto clause, a court must ascertain whether the legislature meant the statute to establish civil proceedings,⁴ and the first level of inquiry in determining whether a particular statutorily defined penalty is civil or criminal is whether the legislature has indicated an intention to enact a regulatory scheme that is civil and nonpunitive⁵ as opposed to imposing punishment.⁶

If the intention of the legislature was to impose punishment, that ends the inquiry, but if the intention was to enact a regulatory scheme that is civil and nonpunitive, the court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to deem it civil.⁷ The inquiry as to whether a statute's effects are punitive in nature, for the purposes of ex post facto analysis, cannot be answered by looking at the effect of any single provision in the abstract; instead, the court must consider the effect of all the provisions and their cumulative impact upon the defendant's rights.⁸ Relevant to the inquiry as to whether a statute intended as civil is sufficiently punitive in its effects as to constitute punishment are questions of whether the sanction involves the common incidents of criminal punishment.⁹

The ex post facto prohibition cannot be evaded by giving a civil form to provisions which are in effect criminal,¹⁰ as in the guise of prescribing qualifications for holding office or practicing certain callings,¹¹ and where a restraint of liberty is involved, the denomination of a proceeding as "criminal" or "civil" is of no moment in determining a violation of the constitutional provision on ex post facto laws.¹² Conversely, the location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one for purposes of the ex post facto clause.¹³

CUMULATIVE SUPPLEMENT

Cases:

Because courts usually defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty, for purposes of the Ex Post Facto Clauses. U.S. Const. art. 1, § 9, cl. 3; art. 1, § 10, cl. 1. *United States v. Wass*, 954 F.3d 184 (4th Cir. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 Fla.—*Goad v. Florida Dept. of Corrections*, 845 So. 2d 880 (Fla. 2003).
Idaho—*Groves v. State*, 156 Idaho 552, 328 P.3d 532 (Ct. App. 2014).
Mass.—*In re Dutil*, 437 Mass. 9, 768 N.E.2d 1055 (2002).
Mich.—*People v. Earl*, 495 Mich. 33, 845 N.W.2d 721 (2014).
Wis.—*In re Commitment of Rachel*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762 (2002).
As to construction of laws, generally, see § 677.
- 2 Tex.—*Rodriguez v. State*, 93 S.W.3d 60 (Tex. Crim. App. 2002).
- 3 Tex.—*Rodriguez v. State*, 93 S.W.3d 60 (Tex. Crim. App. 2002).
- 4 U.S.—*Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).
Fla.—*Goad v. Florida Dept. of Corrections*, 845 So. 2d 880 (Fla. 2003).
N.H.—*Doe v. State*, 2015 WL 575847 (N.H. 2015).
- 5 N.H.—*Doe v. State*, 2015 WL 575847 (N.H. 2015).
N.J.—*Riley v. New Jersey State Parole Bd.*, 219 N.J. 270, 98 A.3d 544 (2014).

Registration and notification of sex offenders

(1) For the purpose of an ex post facto analysis, the intent of the legislature in adopting a sex offender registration act was to create a civil, nonpunitive regime; although the act's registration provisions were codified in the state's criminal code, some of the act's provisions related to criminal administration, and the state's criminal pleading rule required informing a defendant of the act's requirements, the act's stated objective of protecting the public from sex offenders was nonpunitive, the act contained many provisions not involving criminal punishment, parts of the act were codified in civil provisions, and the act mandated no procedures other than a duty to register and instead vested authority to promulgate rules implementing the act's regulations with an administrative agency.

U.S.—*Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

(2) Statutes for registration and community notification of convicted sex offenders were totally remedial in purpose, and any deterrent effect from offenders' loss of anonymity was merely an inevitable consequence, which thus supported the conclusion that the statutes did not impose punishment for purposes of constitutional challenges under the ex post facto clause; the statutes were designed by the legislature solely to enable the public to protect itself from the danger posed by sex offenders who were widely regarded as having the highest risk of recidivism.

N.J.—*Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 36 A.L.R.5th 711 (1995).

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Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. §§ 16901 et seq., its Enforcement Provision, 18 U.S.C.A § 2250, and Associated Regulations, 30 A.L.R. Fed. 2d 213.

Ky.—*Stage v. Com.*, 2014 WL 3765449 (Ky. Ct. App. 2014).

N.H.—*Doe v. State*, 2015 WL 575847 (N.H. 2015).

N.J.—*Riley v. New Jersey State Parole Bd.*, 219 N.J. 270, 98 A.3d 544 (2014).

N.C.—*In re Hall*, 768 S.E.2d 39 (N.C. Ct. App. 2014).

Inclusion in criminal code

A statute's inclusion in the criminal code does not necessarily evidence a legislative intent to make the statute penal for purposes of an ex post facto analysis.

Del.—*Helman v. State*, 784 A.2d 1058 (Del. 2001).

U.S.—*Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

Fla.—*Goad v. Florida Dept. of Corrections*, 845 So. 2d 880 (Fla. 2003).

N.C.—*In re Hall*, 768 S.E.2d 39 (N.C. Ct. App. 2014).

Pa.—*Com. v. Perez*, 2014 PA Super 142, 97 A.3d 747 (2014).

N.H.—*Doe v. State*, 2015 WL 575847 (N.H. 2015).

La.—*State v. Trosclair*, 89 So. 3d 340 (La. 2012).

U.S.—*U.S. v. An Article of Food Consisting of Cartons of Swordfish*, 395 F. Supp. 1184 (S.D. N.Y. 1975).

U.S.—*Ex parte Garland*, 71 U.S. 333, 18 L. Ed. 366, 32 How. Pr. 241, 1866 WL 9477 (1866); *Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866).

Incarceration as "punishment"

Although the constitutional ex post facto prohibition applies only to laws respecting criminal punishment, the prohibition was not inapplicable to retroactive application of an amendment extending juvenile court jurisdiction from age 18 to age 21, on the ground that the extension was not intended to punish the juvenile but rather to provide further counseling and treatment and that juvenile proceedings are "civil" rather than "criminal," since, in view of the restraint of liberty involved, such proceedings were subject to the same strict constitutional scrutiny whatever they were deemed; involuntary incarceration was "punishment" within the purview of the prohibition.

Wash.—*Johnson v. Morris*, 87 Wash. 2d 922, 557 P.2d 1299 (1976).

D.C.—*In re W.M.*, 851 A.2d 431 (D.C. 2004).

16A C.J.S. Constitutional Law § 677

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

1. In General

§ 677. Construction so as to avoid classification as ex post facto

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2787

If possible, laws will be construed to have a prospective effect only so as to avoid being ex post facto.

Laws which would be ex post facto if applied to offenses occurring before their passage will, if possible, be construed as having only a prospective effect.¹ A mere change in phraseology, not creating a new offense or changing the punishment, will not give a statute an ex post facto effect.² In applying this rule, particular statutes have been construed by the courts as not making changes, which violate the ex post facto prohibition.³

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Footnotes

- ¹ Conn.—*State v. Kemp*, 126 Conn. 60, 9 A.2d 63 (1939).
- ² U.S.—*Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952).
- ³ U.S.—*U.S. v. Powers*, 307 U.S. 214, 59 S. Ct. 805, 83 L. Ed. 1245 (1939).

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16A C.J.S. Constitutional Law § 678

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

a. In General

§ 678. Laws creating offenses

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2785, 2789

A law creating a new offense, or punishing acts not punishable when committed, is ex post facto as to acts committed before its passage.

A law which creates a new offense, or makes an act punishable which was not punishable at all when committed, is an ex post facto law as to acts committed before its passage¹ or approval.² An ex post facto violation resulting from a conviction under a statute that was not in effect on the date of the alleged offense cannot be remedied by replacing it with a conviction under a statute in effect at the time of the alleged offense.³ Furthermore, the constitutional prohibition against ex post facto laws cannot be avoided merely by adding to a law notice that it might be changed.⁴

However, a law is not ex post facto if it provides that acts not theretofore punishable shall constitute offenses if committed after the passage of the act.⁵

Erroneous failure to instruct jury as to enactment date.

A claim that a trial court's error in failing to instruct the jury as to the enactment date of the statute under which the indictment was brought resulted in defendant being erroneously convicted based exclusively on noncriminal, preenactment conduct would be a due process claim, and not an ex post facto, claim.⁶

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Footnotes

- 1 U.S.—[Beazell v. Ohio](#), 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925).
 Ind.—[Patrick v. Butts](#), 12 N.E.3d 270 (Ind. Ct. App. 2014).
 Wash.—[In re Flint](#), 174 Wash. 2d 539, 277 P.3d 657 (2012).
 As to definition to same effect, see § 671.
Extradition not punishment
 A statute or treaty may provide for extradition of a criminal for an offense committed in another state or country before enactment thereof as the fact of extradition cannot properly be regarded as punishment within the sense of that word as used when considering the subject of ex post facto laws.
 Tex.—[Ex parte Coleman](#), 157 Tex. Crim. 37, 245 S.W.2d 712 (1951).
- 2 U.S.—[Burgess v. Salmon](#), 97 U.S. 381, 24 L. Ed. 1104, 1878 WL 18314 (1878).
- 3 Kan.—[Seaton v. State](#), 27 Kan. App. 2d 104, 998 P.2d 131 (2000).
- 4 U.S.—[Miller v. Florida](#), 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).
- 5 U.S.—[Chicago & A.R. Co. v. Tranbarger](#), 238 U.S. 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915).
 Mass.—[Com. v. Chase](#), 11 Mass. App. Ct. 884, 421 N.E.2d 91 (1981), *aff'd*, 385 Mass. 461, 432 N.E.2d 510 (1982).
 As to prospectively operating laws as not ex post facto, see § 671.
Administrative regulations
 U.S.—[U.S. v. Elade Realty Corp.](#), 157 F.2d 979 (C.C.A. 2d Cir. 1946).
- 6 U.S.—[U.S. v. Marcus](#), 560 U.S. 258, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010).

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16A C.J.S. Constitutional Law § 679

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

a. In General

§ 679. Penalty enhancement under habitual criminal, multiple offender, or recidivist laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2785, 2790

A statute increasing punishment for an offense because of previous conviction is not ex post facto because applied where such conviction occurred before its enactment, but punishment of an offense committed before enactment must not be increased because of earlier offenses.

A statute providing that the punishment for an offender shall be increased if he or she has previously been convicted is not ex post facto because applied where the previous conviction or convictions took place before its enactment.¹ This is so because the law does not punish the defendant for the prior offense but merely increases the punishment for the offense on trial.²

However, if the offense being punished occurred before the passage of the statute, the punishment therefor must not be increased by reason of earlier offenses.³ A statute authorizing conviction as being an habitual criminal is not ex post facto as applied where it was enacted before the defendant's first offense.⁴

Prior plea of guilty.

The application of an amendatory statute which merely requires a plea of guilty, not a prior conviction, to establish status as a prior offender is not an ex post facto application of the statute.⁵

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Footnotes

- 1 U.S.—*Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948).
N.C.—*State v. Threadgill*, 741 S.E.2d 677 (N.C. Ct. App. 2013), review denied, 367 N.C. 223, 747 S.E.2d 538 (2013) and review dismissed, 367 N.C. 223, 747 S.E.2d 539 (2013) and cert. denied, 134 S. Ct. 961, 187 L. Ed. 2d 821 (2014).
Tex.—*Conelly v. State*, 451 S.W.3d 471 (Tex. App. Houston 1st Dist. 2014).
Vt.—*State v. Day*, 2012 WL 6633576 (Vt. 2012).
As to constitutionality of habitual criminal laws, generally, see C.J.S., *Criminal Law* § 2293.
Juvenile offender
A habitual juvenile offender act does not violate the ex post facto prohibition by assigning punitive consequences to prior juvenile delinquency adjudications.
Ill.—*People ex rel. Carey v. Chrastka*, 83 Ill. 2d 67, 46 Ill. Dec. 156, 413 N.E.2d 1269 (1980).
A.L.R. Library
Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions, 63 A.L.R.6th 351.
State statutes or ordinances requiring persons previously convicted of crime to register with authorities, 36 A.L.R.5th 161 (sec. 11 superseded in part *Validity, construction, and application of state statutes authorizing community notification of release of convicted sex offender*, 78 A.L.R.5th 489, and secs. 25, 26 superseded in part *Validity, Construction, and Application of State Statutes Imposing Criminal Penalties for Failure to Register as Required Under Sex Offender or Other Criminal Registration Statutes*, 33 A.L.R.6th 91, and sec. 20.5 superseded in part *Validity, Construction, and Application of State Statutory Requirement that Person Convicted of Sexual Offense in Other Jurisdiction Register or Be Classified as Sexual Offender in Forum State*, 34 A.L.R.6th 171, and sec. 24 superseded in part *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Constitutional Issues*, 37 A.L.R.6th 55 (secs. 13, 14 superseded in part *Validity of State Sex Offender Registration Laws Under Equal Protection Guarantees*, 93 A.L.R.6th 1), and *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Duty to Register, Requirements for Registration, and Procedural Matters*, 38 A.L.R.6th 1, and *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Expungement, Stay or Deferral, Exceptions, Exemptions, and Waiver*, 39 A.L.R.6th 577, and secs. 9(a), 9(b) superseded in part *Court's Duty to Advise Sex Offender as to Sex Offender Registration Consequences or Other Restrictions Arising from Plea of Guilty, or to Determine that Offender is Advised Thereof*, 41 A.L.R.6th 141, and secs. 3(a), 3(b) superseded in part *Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions*, 63 A.L.R.6th 351, and sec. 19.2 superseded in part *Validity, Construction and Application of State Sex Offender Registration Statutes Concerning Level of Classification—General Principles, Evidentiary Matters, and Assistance of Counsel*, 64 A.L.R.6th 1, and *Validity, Construction, and Application of State Sex Offender Registration Statutes Concerning Level of Classification—Initial Classification Determination*, 65 A.L.R.6th 1, and *Validity, Construction, and Application of State Sex Offender Registration Statutes Concerning Level of Classification—Claims for Downward Departure*, 66 A.L.R.6th 1, and *Validity, Construction, and Application of State Sex Offender Registration Statutes Concerning Level of Classification—Claims Challenging Upward Departure*, 67 A.L.R.6th 1, and sec. 6 superseded in part *Validity of State Sex Offender Registration Laws Under Equal Protection Guarantees*, 93 A.L.R.6th 1).
Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. §§ 16901 et seq., its Enforcement Provision, 18 U.S.C.A § 2250, and Associated Regulations, 30 A.L.R. Fed. 2d 213.

- 2 Ala.—[Williams v. State](#), 393 So. 2d 492 (Ala. Crim. App. 1981).
N.Y.—[People v. Baker](#), 112 Misc. 2d 496, 447 N.Y.S.2d 223 (Sup 1982).
Tex.—[Conelly v. State](#), 451 S.W.3d 471 (Tex. App. Houston 1st Dist. 2014).
3 Cal.—[People v. Snook](#), 16 Cal. 4th 1210, 69 Cal. Rptr. 2d 615, 947 P.2d 808 (1997).
4 Wash.—[State v. Fowler](#), 187 Wash. 450, 60 P.2d 83 (1936).
5 Mo.—[State v. Eib](#), 716 S.W.2d 304 (Mo. Ct. App. W.D. 1986).

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16A C.J.S. Constitutional Law § 680

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

a. In General

§ 680. Immunity under laws repealing former statutes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2785, 2789

Where a statute repealing former laws is itself ex post facto as to offenses committed before its enactment, one who committed the offense before it became effective cannot be convicted under either the repealed law or the new one.

Where a statute repealing former laws, either expressly or by implication, but making the same offense punishable, is, for any reason, ex post facto as to offenses committed before its enactment, one who committed the offense before the new law went into effect cannot be convicted under either the old law or the new, the former having been repealed and the latter being void as to that offense, and such offender must be discharged.¹

The repealing law is not bad as being ex post facto where it applies only to future offenses,² or where the old law is reenacted,³ or where the new law is the same as the old except that it reduces the punishment.⁴

Footnotes

- 1 U.S.—[In re Medley](#), 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 (1890).
Md.—[Gibson v. State](#), 204 Md. 423, 104 A.2d 800 (1954).
- 2 U.S.—[Murphy v. Com. of Massachusetts](#), 177 U.S. 155, 20 S. Ct. 639, 44 L. Ed. 711 (1900).
As to retrospective operation of ex post facto laws, generally, see § 672.
- 3 N.Y.—[People ex rel. Ammon v. Johnson](#), 114 A.D. 876, 100 N.Y.S. 256 (2d Dep't 1906).
- 4 Neb.—[Hair v. State](#), 16 Neb. 601, 21 N.W. 464 (1884).
As to mitigation of punishment, generally, see § 681.

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16A C.J.S. Constitutional Law § 681

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

b. Laws Increasing Punishment

(1) In General

§ 681. Retroactivity of laws increasing punishment, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2815 to 2818

Retrospective laws increasing the punishment for a crime after its commission are ex post facto, but laws mitigating the punishment may apply to past offenses.

Generally, laws are ex post facto and, therefore, unconstitutional where they change the punishment and inflict a greater punishment than the law annexed to the crime or offense when committed¹ or deprive the accused of a possible avenue of lesser punishment than the law annexed to the crime or offense when committed.² In addition, laws are ex post facto where they impose a new punishment in addition to that then prescribed³ as by the imposition of costs and fines not previously assessable.⁴ Central to the ex post facto prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.⁵ The Ex Post Facto Clause in the Federal Constitution looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed,⁶ while the focus of the ex post facto clause in some state constitutions is directed more toward the actual punishment imposed.⁷

The probability that a defendant will receive a greater sentence as a result of the enactment need not be absolute, the touchstone of the Supreme Court's inquiry into whether a sentencing law violates the Ex Post Facto Clause being whether a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes; the question when a change in law creates such a risk is a matter of degree, and the test cannot be reduced to a single formula.⁸ Mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the Ex Post Facto Clause.⁹ However, changes in the law need not bind a sentencing authority in order to violate the Ex Post Facto Clause, and the fact that the sentencing authority exercises some measure of discretion will not defeat an ex post facto claim.¹⁰

A law need not increase the maximum sentence for which a defendant is eligible in order to violate the Ex Post Facto Clause.¹¹ For instance, a statute depriving the accused of the discretion of the court in fixing his or her sentence at a definite term, less than the maximum, operates to increase the punishment,¹² and laws which retroactively modify the time of discharge from custody to the substantial detriment of the accused, thereby in effect increasing the punishment previously imposed for his or her crime, have an ex post facto effect.¹³

Generally, a law is not ex post facto as applied to a person who suffers no additional punishment as a result of the enactment of the law.¹⁴ Thus, a statute ameliorating or mitigating the punishment for a crime may be made to apply to past offenses,¹⁵ and a law which authorizes a shorter maximum or minimum imprisonment than that authorized under the former law is one in mitigation.¹⁶

Sentencing Guidelines.

The Ex Post Facto Clause forbids the government to enhance the measure of punishment by altering the substantive formula used to calculate the applicable sentencing range.¹⁷ The clause is violated when a defendant is sentenced under Guidelines promulgated after the defendant committed the criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense; a retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence.¹⁸ The clause is also violated by the application of a Sentencing Guidelines amendment requiring a motion by the government to qualify the defendant for an additional one-point offense level reduction for acceptance of responsibility when the guideline in effect at the time the offense was committed did not require a government motion.¹⁹

A court is entitled to employ the sentencing guidelines in place at the time of sentencing unless doing so would expose the defendant to harsher penalties than were in effect at the time the crime was committed; therefore, in order to establish that the Ex Post Facto Clause requires the application of an earlier version of the sentencing guidelines, a defendant must show that the crime was committed at a time that the earlier guidelines version was in force and that the earlier version is more favorable to him or her.²⁰ The application of a sentencing guidelines amendment that prohibits an otherwise available downward departure to an offense that occurred before the amendment was enacted violates the Ex Post Facto Clause since the amendment has a detrimental effect on the defendant.²¹

Conspiracy.

A statute increasing the penalty for conspiracy to commit a crime is not ex post facto as to a conspiracy being carried on when the statute was passed,²² but the accused must engage in the specific conduct proscribed by the statute after its effective date.²³

Actions not amounting to increase in punishment.

Not every governmental action which subjects a defendant or prisoner to an increased burden of some kind qualifies as an increase in punishment for the crime. For instance, retroactive application of an amended federal statute to require an individual to provide a DNA sample based on a conviction for possessing a firearm while subject to a restraining order that predated the amendment and was not covered by the statute at the time the defendant committed it did not violate the Ex Post Facto Clause.²⁴ Moreover, a state agency's alleged change of policy from encouraging prison gang membership to punishing members by transferring them to a high security facility did not constitute an ex post facto violation since the transfer was not an increase in punishment for the crime for which they were convicted.²⁵

CUMULATIVE SUPPLEMENT

Cases:

Newly enacted statute which prohibited child-solicitation defendant from entering school property amounted to retroactive punishment in violation of Ex Post Facto Clause of Indiana Constitution, although statute had purpose other than to punish, namely, promoting public safety and protecting children, where disability or restraint imposed by statute was neither minor nor indirect, act of restricting individuals from entering school property was historically considered form of punishment, statute required showing of mens rea, statute was direct deterrent to sex offenders and therefore promoted traditional aim of punishment, determination of guilt for underlying offense exposed defendant to further criminal liability, and effects of statute were excessive. [Ind. Const. art. 1, § 24](#); [Ind. Code Ann. § 35-42-4-14\(b\)](#). [Kirby v. State, 83 N.E.3d 1237 \(Ind. Ct. App. 2017\)](#).

The Ex Post Facto Clauses of the United States and Iowa Constitutions forbid enactment of laws that impose punishment for an act that was not punishable when committed or that increases the quantum of punishment provided for the crime when it was committed. [U.S. Const. art. 1, § 10, cl. 1](#); [Iowa Const. art. 1, § 21](#). [State v. Aschbrenner, 926 N.W.2d 240 \(Iowa 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 \(1981\)](#).
Cal.—[People v. Delgado, 140 Cal. App. 4th 1157, 45 Cal. Rptr. 3d 501 \(1st Dist. 2006\)](#).
D.C.—[In re W.M., 851 A.2d 431 \(D.C. 2004\)](#).
La.—[State v. Odoms, 94 So. 3d 166 \(La. Ct. App. 1st Cir. 2012\)](#), writ denied, [108 So. 3d 762 \(La. 2013\)](#).
As to definition to same effect, see § 671.
Administrative interpretation
A change in a sentence interpretation by the department of corrections which would require a prisoner to serve a longer sentence may amount to an ex post facto increase in punishment where such administrative interpretation has the force and effect of law.
Ariz.—[State v. Thomas, 131 Ariz. 547, 642 P.2d 892 \(Ct. App. Div. 1 1982\)](#).
Ind.—[Warner v. State, 265 Ind. 262, 354 N.E.2d 178 \(1976\)](#).
2 U.S.—[Artez v. Mulcrone, 673 F.2d 1169 \(10th Cir. 1982\)](#).
3 Haw.—[State v. Von Geldern, 64 Haw. 210, 638 P.2d 319 \(1981\)](#).
Mode of confinement
(1) The mode of confinement is no part of the punishment and may be changed.
Mass.—[In re Storti, 180 Mass. 57, 61 N.E. 759 \(1901\)](#).

(2) Solitary confinement, keeping the prisoner ignorant of the time of his or her execution, or any other change calculated to add terror to the death penalty makes the law ex post facto as to past offenses.

U.S.—*In re Savage*, 134 U.S. 176, 10 S. Ct. 389, 33 L. Ed. 842 (1890); *In re Medley*, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 (1890).

(3) "Close confinement" is not synonymous with "solitary confinement," and a statute providing "close confinement" as punishment for an offense for which the law in force at the time it was committed provided only "confinement" is not ex post facto.

U.S.—*Rooney v. State of North Dakota*, 196 U.S. 319, 25 S. Ct. 264, 49 L. Ed. 494 (1905).

Ill.—*People v. Harris*, 69 Ill. App. 3d 118, 25 Ill. Dec. 576, 387 N.E.2d 33 (3d Dist. 1979).

U.S.—*U.S. v. Kumar*, 617 F.3d 612 (2d Cir. 2010).

U.S.—*Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); *Lindsey v. Washington*, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).

Ill.—*Harris v. Irving*, 90 Ill. App. 3d 56, 45 Ill. Dec. 394, 412 N.E.2d 976 (5th Dist. 1980).

Increase in possible penalty

An increase in the possible penalty may be a violation of the ex post clause regardless of the length of sentence actually imposed.

N.Y.—*People v. Morales*, 87 Misc. 2d 675, 386 N.Y.S.2d 737 (Sup 1976).

Ill.—*Harris v. Irving*, 90 Ill. App. 3d 56, 45 Ill. Dec. 394, 412 N.E.2d 976 (5th Dist. 1980).

Reclassification from misdemeanor to felony

The reclassification of perjury from a misdemeanor to a felony did not violate ex post facto laws as to an accused who was sentenced under the statute reclassifying perjury as a felony where the accused's sentence did not exact a greater penalty than that permissible under the statute classifying perjury as a misdemeanor.

Ill.—*People v. Massarella*, 80 Ill. App. 3d 552, 36 Ill. Dec. 16, 400 N.E.2d 436 (1st Dist. 1979).

U.S.—*Peugh v. U.S.*, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

U.S.—*Peugh v. U.S.*, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

U.S.—*Peugh v. U.S.*, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

U.S.—*Peugh v. U.S.*, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

U.S.—*Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

Cal.—*In re Dalton*, 117 Cal. App. 3d 521, 172 Cal. Rptr. 783 (4th Dist. 1981).

Extending discharge date of juveniles

Legislation extending the maximum date for discharge of juveniles held by the youth authority could not constitutionally be applied to persons committed to the youth authority's custody prior to the enactment of such legislation, and to the extent such legislation purported to do so, it was invalid as constituting an ex post facto law.

Cal.—*In re Dewing*, 19 Cal. 3d 54, 136 Cal. Rptr. 708, 560 P.2d 375 (1977).

U.S.—*Guzman v. Morris*, 644 F.2d 1295 (9th Cir. 1981).

Cal.—*People v. Henderson*, 107 Cal. App. 3d 475, 166 Cal. Rptr. 20 (3d Dist. 1980).

Haw.—*State v. Von Geldern*, 64 Haw. 210, 638 P.2d 319 (1981).

Iowa.—*State v. Quanrude*, 222 N.W.2d 467 (Iowa 1974).

Legislative discretion to make laws for mitigation of punishment

N.H.—*State v. Matthews*, 157 N.H. 415, 951 A.2d 155 (2008).

Allowing jury to recommend mercy

Mass.—*Com. v. Vaughn*, 329 Mass. 333, 108 N.E.2d 559 (1952).

Collection of fines and costs

Statutes which provide alternative means for collection of fines and costs from criminal defendants by permitting delayed or installment payment are not ex post facto laws.

Tex.—*Ex parte Scott*, 471 S.W.2d 54 (Tex. Crim. App. 1971).

La.—*State v. Cryer*, 262 La. 575, 263 So. 2d 895 (1972) (overruled on other grounds by, *State v. Smith*, 327 So. 2d 355 (La. 1975)).

Measure for comparing penalties

The measure for determining whether one penalty is greater than another, for purpose of the constitutional ban on ex post facto laws, is the maximum duration of the penalty, not the possible duration of imprisonment.

Ind.—*State v. Turner*, 178 Ind. App. 562, 383 N.E.2d 428 (1978).

U.S.—*Peugh v. U.S.*, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

- 18 U.S.—[Peugh v. U.S.](#), 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).
Revised sentencing guidelines retrospective
U.S.—[Miller v. Florida](#), 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).
Two-level sentencing enhancement for maintaining stash house
U.S.—[U.S. v. Adams](#), 746 F.3d 734 (7th Cir. 2014).
- 19 U.S.—[U.S. v. Borer](#), 412 F.3d 987 (8th Cir. 2005).
- 20 U.S.—[U.S. v. Lennon](#), 372 F.3d 535 (3d Cir. 2004).
- 21 U.S.—[U.S. v. Smith](#), 311 F. Supp. 2d 801 (E.D. Wis. 2004).
- 22 U.S.—[U.S. v. Wells Fargo Armored Service Corp.](#), 587 F.2d 782 (5th Cir. 1979).
N.Y.—[People v. Rosenberg](#), 93 Misc. 2d 965, 404 N.Y.S.2d 246 (Sup 1978).
Conspiracy continuing beyond enactment
The ex post facto rights of defendants convicted of conspiracy to defraud the United States by impeding and impairing the functions of the Internal Revenue Service and to commit offenses against United States were not violated by the sentencing court's use of the 2001 version of the Sentencing Guidelines, which provided for a higher applicable Sentencing Guidelines range in light of the \$60 million tax revenue loss caused by the conspiracy, even if most of the loss occurred prior to the enactment of the 2001 Guidelines, where the defendants' conspiracy did not conclude until 2003, and defendants did not withdraw from the conspiracy prior to the conclusion of the conspiracy.
U.S.—[U.S. v. Vallone](#), 752 F.3d 690 (7th Cir. 2014).
- 23 U.S.—[U.S. v. Torres](#), 901 F.2d 205, 30 Fed. R. Evid. Serv. 113 (2d Cir. 1990).
- 24 U.S.—[U.S. v. Coccia](#), 598 F.3d 293 (6th Cir. 2010).
- 25 U.S.—[Westefer v. Snyder](#), 422 F.3d 570 (7th Cir. 2005).

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16A C.J.S. Constitutional Law § 682

Corpus Juris Secundum | June 2021 Update

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

b. Laws Increasing Punishment

(1) In General

§ 682. Change in kind of punishment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 2815, 2818

A change in the kind of punishment is valid if it mitigates the former punishment or is of no practical consequence to the prisoner.

An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.¹ However, an act is valid if it prescribes a new kind of punishment which, in the opinion of the court, is clearly in mitigation of that prescribed by the former law or the change in which is to the prisoner's advantage,² particularly if the prisoner may elect to be punished under the old law.³ In this connection, it is sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed.⁴ In any event, a statute embodying a change which is of no practical consequence to the prisoner is not ex post facto.⁵

Footnotes

- 1 U.S.—*Fletcher v. Peck*, 10 U.S. 87, 3 L. Ed. 162, 1810 WL 1558 (1810).
Pa.—*Burrello v. Com., State Emp. Retirement System*, 49 Pa. Commw. 364, 411 A.2d 852 (1980).
- 2 Ariz.—*Hernandez v. State*, 43 Ariz. 424, 32 P.2d 18 (1934).
- 3 U.S.—*James v. Twomey*, 466 F.2d 718 (7th Cir. 1972).
Ill.—*People v. Finley*, 82 Ill. App. 3d 307, 37 Ill. Dec. 767, 402 N.E.2d 769 (1st Dist. 1980).
- 4 U.S.—*Rooney v. State of North Dakota*, 196 U.S. 319, 25 S. Ct. 264, 49 L. Ed. 494 (1905).
- 5 U.S.—*Rooney v. State of North Dakota*, 196 U.S. 319, 25 S. Ct. 264, 49 L. Ed. 494 (1905).

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16A C.J.S. Constitutional Law § 683

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

b. Laws Increasing Punishment

(1) In General

§ 683. Capital offenses laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑2815

The imposition of the death penalty under a constitutional or statutory provision which was not in effect at the time of the commission of the offense is precluded by the constitutional prohibition against ex post facto laws.

Generally, the imposition of the death penalty under a constitutional or statutory provision which was not in effect at the time of the commission of the offense is precluded by the constitutional prohibition against ex post facto laws,¹ but statutes imposing the death penalty may be retroactively applied where they are procedural and ameliorative² or where they do not expose the accused to a greater penalty than that which originally could have been imposed at the time of the commission of the offense.³

A statute which prescribes death as the sole penalty, whereas the former law provided for death or imprisonment for life in the discretion of the jury, is void as to past offenses.⁴ There is authority that where the death penalty has been invalidated as to a crime, a sentence of life imprisonment cannot be imposed where no lesser included offense of the crime carried such a penalty

at the time of the commission of the crime.⁵ However, under other authority, a statute changing the punishment from death to imprisonment for life has been held to be in mitigation of the punishment and valid.⁶ Moreover, under such latter authority, a sentence for life imprisonment may be imposed after a death penalty statute has been declared unconstitutional without violating the prohibition against ex post facto laws.⁷ In any event, the application of a statute in effect at the time of the commission of the crime, which provides for a sentence of life imprisonment is not an ex post facto application of the law.⁸

Aggravating factors.

The application, on resentencing in a capital murder case, of an aggravating circumstance which was added to the statutory aggravating factors after the murder occurred but before defendant's resentencing is not an ex post facto violation where the facts on which the trial judge relies to apply the factor are the same facts underlying the application of the other aggravating factors.⁹ Where the government's use of nonstatutory aggravating factors at the penalty phase of a capital murder prosecution does not increase the possible punishment or alter the elements of the offense, it does not violate the Ex Post Facto Clause.¹⁰

Execution of death penalty.

Changes in the procedures by which a death sentence is executed do not affect substantial rights of a prisoner in such a manner as to implicate the prohibition against ex post facto laws.¹¹ An act extending the time within which an execution may take place has been held void by some authorities¹² but sustained by others as in mitigation of the punishment prescribed by the former law.¹³ A statute shortening the time within which an execution may take place after sentence is void as to prior offenses as changing the law to the disadvantage of the accused.¹⁴ Acts requiring the execution of a capital sentence to be made at a different place,¹⁵ or out of the public view,¹⁶ or at a different time of the day,¹⁷ are not ex post facto as to prior offenses. Similarly, constitutional or statutory provisions changing the manner of execution are not ex post facto as to prior offenses.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Imposition of death penalty did not result in ex post facto violation, in prosecution for first-degree murder, notwithstanding uncertainty surrounding legislature's repeal of the death penalty and subsequent referendum staying the repeal until the next general election, where the death penalty was in effect at the time of defendant's crimes, and it was in effect when defendant was sentenced. [U.S. Const. Amend. 6](#); [Neb. Const. art. 1, § 16](#). [State v. Jenkins](#), 303 Neb. 676, 931 N.W.2d 851 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Cal.—People v. Hillery](#), 10 Cal. 3d 897, 112 Cal. Rptr. 524, 519 P.2d 572 (1974).
[Tenn.—Miller v. State](#), 584 S.W.2d 758 (Tenn. 1979).
Conduct occurring after effective date
Application of an amended murder-for-hire statute, which increased the maximum punishment to death, to defendants involved in a plot to kill a victim prior to the amendment's effective date did not violate the Ex Post facto Clause where the conduct essential to completing the crime and proving the murder-for-hire

scheme, such as receipt of pecuniary gain and the use of the mails to obtain life insurance proceeds, occurred after the amendment took effect.

U.S.—[U.S. v. Mueller](#), 661 F.3d 338, 86 A.L.R. Fed. 2d 643 (8th Cir. 2011).

Death of victim after effective date

Where all of the murderous acts were committed by the accused at a time when the maximum punishment for first-degree murder was life imprisonment, the imposition of a death sentence violated the prohibition against the imposition of ex post facto punishment notwithstanding that the victim did not die until after the effective date of a statute providing for a death sentence.

N.C.—[State v. Detter](#), 298 N.C. 604, 260 S.E.2d 567 (1979).

U.S.—[Dobbert v. Florida](#), 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

Md.—[Tichnell v. State](#), 287 Md. 695, 415 A.2d 830 (1980).

As to laws affecting procedure as not ex post facto, generally, see § 690.

As to ameliorative statutes as not ex post facto, generally, see § 681.

Taking sentencing decision from court and giving it to jury

Ariz.—[State v. Roseberry](#), 210 Ariz. 360, 111 P.3d 402 (2005).

Neb.—[State v. Vela](#), 279 Neb. 94, 777 N.W.2d 266 (2010).

Change by judiciary

(1) Since a "change" in a state's death penalty statute as a result of an interpretation by a state supreme court decision was both procedural and ameliorative, no ex post facto problems arose even with respect to those prisoners tried and sentenced before such decision.

U.S.—[Knapp v. Cardwell](#), 667 F.2d 1253 (9th Cir. 1982).

(2) The imposition of the death penalty under judicially established procedures of a court did not constitute an ex post facto law in that the changes brought about as a result thereof were procedural and ameliorative.

U.S.—[Irving v. Hargett](#), 518 F. Supp. 1127 (N.D. Miss. 1981).

Fla.—[Miller v. State](#), 332 So. 2d 65 (Fla. 1976).

Mass.—[Com. v. Harrington](#), 367 Mass. 13, 323 N.E.2d 895 (1975).

La.—[State v. Lee](#), 340 So. 2d 180 (La. 1976) (disapproved of on other grounds by, [State v. Hamilton](#), 356 So. 2d 1360 (La. 1978)).

Mass.—[Com. v. Vaughn](#), 329 Mass. 333, 108 N.E.2d 559 (1952).

As to statutes in mitigation of punishment as not ex post facto, generally, see § 681.

U.S.—[Smith v. Johnson](#), 458 F. Supp. 289 (E.D. La. 1977), judgment aff'd, 584 F.2d 758 (5th Cir. 1978).

N.C.—[State v. Kirkman](#), 293 N.C. 447, 238 S.E.2d 456 (1977).

Mo.—[State v. Hanson](#), 587 S.W.2d 895 (Mo. Ct. App. S.D. 1979).

U.S.—[Muhammad v. Secretary, Florida Dept. of Corrections](#), 733 F.3d 1065 (11th Cir. 2013).

U.S.—[U.S. v. Montgomery](#), 10 F. Supp. 3d 801 (W.D. Tenn. 2014).

Ark.—[Lard v. State](#), 2014 Ark. 1, 431 S.W.3d 249 (2014), petition for certiorari filed, 135 S. Ct. 76, 190 L. Ed. 2d 67 (2014).

Mont.—[Langford v. State](#), 287 Mont. 107, 951 P.2d 1357 (1997).

Cal.—[People v. McNulty](#), 3 Cal. Unrep. 441, 28 P. 816 (Cal. 1891), opinion modified and superseded on other grounds on reh'g, 93 Cal. 427, 29 P. 61 (1892).

Okla.—[Alberty v. State](#), 1914 OK CR 48, 10 Okla. Crim. 616, 140 P. 1025 (1914).

Cal.—[People v. De Moss](#), 5 Cal. 2d 612, 55 P.2d 489 (1936).

U.S.—[Rooney v. State of North Dakota](#), 196 U.S. 319, 25 S. Ct. 264, 49 L. Ed. 494 (1905).

U.S.—[Holden v. State of Minnesota](#), 137 U.S. 483, 11 S. Ct. 143, 34 L. Ed. 734 (1890).

U.S.—[Holden v. State of Minnesota](#), 137 U.S. 483, 11 S. Ct. 143, 34 L. Ed. 734 (1890).

Miss.—[Wetzel v. Wiggins](#), 226 Miss. 671, 85 So. 2d 469 (1956).

16A C.J.S. Constitutional Law § 684

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

b. Laws Increasing Punishment

(1) In General

§ 684. Indeterminate sentence laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2816

Indeterminate sentence laws are not unconstitutional as such, even as applied to past offenses, but a subsequent indeterminate sentence law is an ex post facto law when it alters the situation of the accused to his or her disadvantage.

Indeterminate sentence laws providing that, instead of sentence of imprisonment for a definite time, the sentence shall be for not less than a certain minimum nor more than a certain maximum, the length of the term between such limits to depend on the behavior of the prisoner, are not unconstitutional as such,¹ even as applied to past offenses,² especially where the indeterminate sentence law relates only to procedure.³

On the other hand, it has been held that a subsequent indeterminate sentence law is an ex post facto law when it alters the situation of the accused to his or her disadvantage.⁴ Furthermore, indeterminate sentence laws are void as to past offenses if

either the maximum or minimum punishment provided is greater than that prescribed by the law in force when such offenses were committed⁵ or if otherwise more onerous.⁶

Under some authorities, where an indeterminate sentence is regarded as a sentence for the maximum term, the retroactive application of a new statute which might have the effect of increasing the minimum term of imprisonment applicable under the old statute but which changes the maximum term thereunder from life imprisonment to a specified term of years does not violate the ex post facto clause.⁷

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Footnotes

- 1 N.Y.—[People ex rel. Berger v. Warden of the Workhouse](#), 176 A.D. 602, 163 N.Y.S. 910 (1st Dep't 1917).
As to validity of indeterminate sentence laws, generally, see [C.J.S., Criminal Law § 2006](#).
- 2 Wash.—[Mason v. Cranor](#), 42 Wash. 2d 610, 257 P.2d 211 (1953).
- 3 Okla.—[Smith v. State](#), 1971 OK CR 240, 486 P.2d 744 (Okla. Crim. App. 1971).
As to laws affecting procedure as not ex post facto, generally, see [§ 690](#).
- 4 Okla.—[Rooker v. Page](#), 1969 OK CR 311, 462 P.2d 283 (Okla. Crim. App. 1969).
- 5 Mich.—[In re Lambrecht](#), 137 Mich. 450, 100 N.W. 606 (1904).
- 6 W. Va.—[State v. Fisher](#), 126 W. Va. 117, 27 S.E.2d 581 (1943).
Technical custody for full period
The application of an indeterminate sentence law for second offenders to crimes committed before its enactment is unconstitutional as ex post facto since it requires a prisoner to be in the technical custody of the warden for the full maximum period.
N.Y.—[Application of Nasti](#), 169 Misc. 989, 9 N.Y.S.2d 327 (Sup 1939).
- 7 N.Y.—[People v. Morales](#), 87 Misc. 2d 675, 386 N.Y.S.2d 737 (Sup 1976).

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

b. Laws Increasing Punishment

(1) In General

§ 685. Probation laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑2818

Although probation is not a sentence but a feature of the suspension of the imposition of a sentence, probation may nevertheless constitute a penalty for the purpose of the constitutional prohibition against ex post facto laws.

Although probation is not a sentence but a feature of the suspension of the imposition of a sentence, probation may nevertheless constitute a penalty for the purpose of the constitutional prohibition against ex post facto laws.¹

The application of a new statutory standard as a factor in the determination of entitlement to probation in order to deny probation for an offense committed prior to the passage of the statute amounts to a violation of the ex post facto prohibition,² and where a probation statute has the effect of increasing the penalty for a crime, its application to offenses occurring before its effective date is unconstitutional as violative of the ex post facto clause.³ However, a court order modifying the conditions of probation supervision to include participation in an intensive supervision program does not modify a probationer's punishment, as would

implicate ex post facto concerns, where the order simply clarifies the conditions of probation and does not change probationer's original sentence, the probationer's participation in the program having been contemplated by the original conditions of the probationer's suspended sentence.⁴

Revocation of probation.

Generally, where the revocation of a person's probation does not increase the sentence on any of his or her convictions and only imposes a sentence which he or she has previously received, an order revoking probation does not violate the prohibition against ex post facto laws.⁵

Probation time credit.

Where a statute requiring that time served on probation be credited against the sentence became effective while the person was on probation, but prior to the revocation of probation it was amended to permit judicial discretion in the matter, the application of the amended statute so as to deny the person credit for time spent on probation constitutes a prohibited ex post facto application of the amendment.⁶

Probation supervision fee.

Regulations imposing a probation supervision fee upon probationers sentenced to probation prior to the regulations' effective date were not punitive in intent or effect and, therefore, did not violate the Ex Post Facto Clause.⁷

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Footnotes

- 1 Ariz.—[State v. Mendivil](#), 121 Ariz. 600, 592 P.2d 1256 (1979).
- 2 **Inclusion of deterrence as factor**
Tenn.—[Boykins v. State](#), 584 S.W.2d 194 (Tenn. 1979).
- 3 Ariz.—[State v. Mendivil](#), 121 Ariz. 600, 592 P.2d 1256 (1979).
- 4 **Program not punitive**
Mont.—[State v. Griffin](#), 2007 MT 289, 339 Mont. 465, 172 P.3d 1223 (2007).
- 5 Ky.—[Brown v. Com.](#), 564 S.W.2d 21 (Ky. Ct. App. 1977).
- 6 Ill.—[People v. Peach](#), 39 Ill. App. 3d 757, 350 N.E.2d 583 (3d Dist. 1976).
- 7 U.S.—[Taylor v. State of R.I.](#), 101 F.3d 780 (1st Cir. 1996).

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16A C.J.S. Constitutional Law § 686

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

b. Laws Increasing Punishment

(2) Pardon, Parole, and Conditional Release Laws

§ 686. Generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 2800, 2823

A change to the period of parole or postrelease supervision is a change in punishment for ex post facto considerations because the period of parole or postrelease supervision is undeniably part of the sentence imposed. While retroactive changes in laws governing parole of inmates may violate the Ex Post Facto Clause, not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited.

A statute authorizing the release on parole of persons convicted of offenses committed before the passage of the act is ameliorative or in mitigation of the punishment and therefore valid.¹ However, where a statute governing the granting of parole is not applied retrospectively, there is no violation of the Ex Post Facto Clause,² and thus, the application of such a statute to a person who was convicted and sentenced subsequent to the enactment of the statute does not violate the Ex Post Facto Clause.³

The right to release on parole has been regarded as an act of grace and not a right and therefore subject to retroactive restriction.⁴ However, a person cannot be deprived of all opportunity to be released free of parole by a retroactive law allowing release only on parole⁵ since such a law provides for punishment in addition to that to which he or she might have been subjected at the time the offense was committed.⁶

A change to the period of parole or postrelease supervision is a change in punishment for ex post facto considerations because the period of parole or postrelease supervision is undeniably part of the sentence imposed.⁷ While retroactive changes in laws governing parole of inmates may violate the Ex Post Facto Clause, not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited.⁸ For instance, parole officials who become more concerned with public safety, and who act on that concern by insisting that prisoners complete sex-offender treatment programs before release on parole, do not violate the Ex Post Facto Clause.⁹

While the courts ordinarily do not construe mere procedural changes in statutes as having a detrimental effect on a prisoner's parole eligibility within the meaning of the ex post facto prohibition,¹⁰ and a statute imposing a condition on parole eligibility is not ex post facto where its purpose is not punitive,¹¹ it has been held that statutes detrimentally affecting parole eligibility are unconstitutional insofar as applied to a prisoner charged with the commission of a crime prior to the enactment of those statutes.¹² This latter rule is applicable where such statutes impose an additional requirement before such a prisoner can be released on parole¹³ or where such statutes increase the time to be served before such a prisoner is eligible for parole consideration¹⁴ or otherwise eliminate¹⁵ or delay¹⁶ such a prisoner's parole eligibility. Generally, a retroactive procedural change in the laws governing the parole of inmates violates the Ex Post Facto Clause when it creates a significant risk of prolonging an inmate's incarceration and not when the risk of prolonging the inmate's incarceration is merely speculative or attenuated.¹⁷

Generally, the application of an amendatory statute is not ex post facto as to a person on parole who commits another offense or otherwise violates his or her parole after the amendatory statute has become effective.¹⁸ However, it has been held that the application of a statutory amendment providing that a person convicted of a crime while on parole or conditional release must serve the unexpired portion of the previous sentence consecutively to any new term of imprisonment disadvantages a person who was convicted and sentenced prior to, but conditionally released subsequent to, the enactment of such amendment, by holding him or her in custody beyond the outside date of the original sentence and making more onerous the punishment for a crime committed before the enactment of such amendment, in violation of the ex post facto prohibition.¹⁹

Furthermore, it has been held that the retroactive application of a statute extending the maximum parole term to a person who had been released on parole prior to the effective date of the statute,²⁰ or to a person whose term and release date were fixed before the enactment of the statute but who was not actually released on parole before the effective date of the statute,²¹ is violative of the ex post facto prohibition. On the other hand, a statute which gives a prisoner the option of being conditionally released as an alternative to seeking parole, which provides for the holding in abeyance of the remainder of the prison term during conditional release and which, unlike the parole statute, does not give credit for time spent on release unless there is a successful completion of the release period, has been held not to be an ex post facto law where it does not inflict greater punishment than the law annexed to the crime when committed or, on balance, alter the situation of a party to his or her disadvantage.²²

Burden to show that retroactive application will prolong incarceration.

When the rule governing parole of prisoners does not by its own terms show a significant risk of increased punishment, the party seeking to demonstrate an ex post facto violation based on retroactive application of the rule must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.²³

Supervised release as equivalent to parole.

For purposes of an ex post facto analysis, there is absolutely no difference between parole and supervised release.²⁴

Reincarceration following supervised release.

Reincarceration of prisoners convicted of murder, after they have been released pursuant to an electronic supervision program, under a new regulation eliminating the program for prisoners convicted of murder, does not violate the Ex Post Facto Clause where the prisoners committed their crimes of conviction at times predating the creation of the program so that the decision to disqualify prisoners from participation has no effect on the punishment assigned by law when the act to be punished occurred.²⁵

Repeal of pardon law.

The repeal of a law declaring that serving of a sentence shall have the effect of a pardon is not ex post facto as to a person who had not completed his or her sentence when the statute was enacted.²⁶

CUMULATIVE SUPPLEMENT

Cases:

Governor did not violate ex post facto clause by commuting defendant's death sentences to sentences of life imprisonment without possibility of parole; even assuming that executive actions were included within ex post facto provision, defendant did not suffer disadvantage, and commutation did not result in greater punishment than law annexed to crime when committed. *Md. Const. Declaration of Rights, art. 17. Grandison v. State*, 234 Md. App. 564, 174 A.3d 388 (2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Breest v. Helgemoe*, 579 F.2d 95 (1st Cir. 1978).
N.H.—*State v. Breest*, 116 N.H. 734, 367 A.2d 1320 (1976).
As to statutes ameliorating or mitigating the punishment for a crime as not ex post facto, generally, see § 681.
- 2 U.S.—*Burgos v. U.S. Bd. of Parole*, 360 F. Supp. 316 (N.D. Ill. 1973).
- 3 U.S.—*Artez v. Mulcrone*, 673 F.2d 1169 (10th Cir. 1982).
Ark.—*Pitts v. Hobbs*, 2013 Ark. 457, 2013 WL 5968940 (2013).
- 4 U.S.—*U S ex rel Kelly v. Martin*, 108 F. Supp. 672 (W.D. N.Y. 1952), judgment aff'd, 200 F.2d 336 (2d Cir. 1952).
N.Y.—*People ex rel. King v. Morhous*, 286 A.D. 925, 142 N.Y.S.2d 672 (3d Dep't 1955).
Parole in nature of gift
Ill.—*Harris v. Irving*, 90 Ill. App. 3d 56, 45 Ill. Dec. 394, 412 N.E.2d 976 (5th Dist. 1980).
Changing conditions
A law changing the conditions of parole, passed after the crime was committed, was not invalid as ex post facto as to a paroled convict.
N.Y.—*People ex rel. Parker v. Brophy*, 244 A.D. 880, 280 N.Y.S. 114 (4th Dep't 1935).
- 5 U.S.—*Lindsey v. Washington*, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).

- 6 U.S.—[People of U.S. ex rel. Umbenhowar v. McDonnell](#), 11 F. Supp. 1014 (N.D. Ill. 1934).
- 7 Kan.—[Martin v. Kansas Parole Bd.](#), 292 Kan. 336, 255 P.3d 9 (2011).
- 8 U.S.—[Gilman v. Schwarzenegger](#), 638 F.3d 1101 (9th Cir. 2011).
- 9 U.S.—[Grennier v. Frank](#), 453 F.3d 442 (7th Cir. 2006).
- 10 **Increased scrutiny time**
The application of a later-enacted sentencing statute, which would not result in a later date for a prisoner's earliest possible release on parole, did not violate the ex post facto clause merely because the board of pardons and paroles would have more opportunities to scrutinize the behavior of the prisoner than it would have had prior to enactment of the statute.
Ariz.—[State v. LaBarre](#), 125 Ariz. 497, 610 P.2d 1058 (Ct. App. Div. 1 1980).
- 11 **Assets and income disclosure**
A statute requiring that, as a condition of parole eligibility, prisoners disclose their assets and income and be assessed the cost of their subsistence in prison is not ex post facto legislation on the ground that it operates to increase punishment for prisoners whose crimes were committed prior to its effective date.
Fla.—[Ivory v. Wainwright](#), 393 So. 2d 542 (Fla. 1980).
- 12 Ariz.—[State v. Pendergraft](#), 124 Ariz. 449, 604 P.2d 1160 (Ct. App. Div. 2 1979).
Change in deterrence criteria
The application of parole criteria to a petitioner who committed a crime prior to the enactment thereof contravened the Ex Post Facto Clause where the change from special deterrence criteria to general deterrence criteria worked substantial harm to the petitioner.
U.S.—[Welsh v. Mizell](#), 668 F.2d 328 (7th Cir. 1982) (overruled on other grounds by, [Heirens v. Mizell](#), 729 F.2d 449 (7th Cir. 1984)).
- 13 **Vote of parole board**
Where, up through the time of the petitioner's resentencing, a favorable vote of a simple majority of the membership of the board of parole was sufficient to grant paroles in all cases, application to the petitioner of an amendment requiring a favorable vote of at least four of the five members of the board violated the Ex Post Facto Clause.
U.S.—[U. S. ex rel. Steigler v. Board of Parole](#), 501 F. Supp. 1077 (D. Del. 1980).
Retention of jurisdiction
The trial court's retention of jurisdiction over an offense committed prior to the enactment of a statute governing eligibility for parole constituted an ex post facto application of the statute.
Fla.—[Wilson v. State](#), 414 So. 2d 512 (Fla. 1982).
- 14 Cal.—[People v. Superior Court of Santa Cruz County](#), 115 Cal. App. 3d 687, 185 Cal. Rptr. 290 (1st Dist. 1981).
- 15 Mont.—[State v. Beachman](#), 189 Mont. 400, 616 P.2d 337 (1980).
- 16 Mont.—[State v. Beachman](#), 189 Mont. 400, 616 P.2d 337 (1980).
- 17 U.S.—[Gilman v. Schwarzenegger](#), 638 F.3d 1101 (9th Cir. 2011).
- 18 Neb.—[Berry v. Wolff](#), 193 Neb. 717, 228 N.W.2d 885 (1975).
Tolling running of sentence
A statute stopping the running of a parolee's sentence when a violator's warrant is issued was not ex post facto legislation as it did not increase the punishment nor take any protection or right from the parolee although the law was passed after the parolee's conviction.
Me.—[Still v. State](#), 256 A.2d 670 (Me. 1969).
- 19 Del.—[Gasby v. State](#), 429 A.2d 165 (Del. 1981).
Application of statute
A sentencing statute, which provided that a person who is convicted or enters a plea of guilty to a felony committed while on parole, probation, or conditional discharge shall not be eligible for such treatment or concurrent sentencing on a subsequent offense, could only be applied to persons convicted of offenses which allegedly occurred on or after the effective date of the statute.
Ky.—[Wethington v. Com.](#), 549 S.W.2d 530 (Ky. Ct. App. 1977).
- 20 Cal.—[In re Bray](#), 97 Cal. App. 3d 506, 158 Cal. Rptr. 745 (4th Dist. 1979).
- 21 Cal.—[In re Thomson](#), 104 Cal. App. 3d 950, 164 Cal. Rptr. 99 (4th Dist. 1980).
- 22 U.S.—[Lloyd v. Oswald](#), 397 F. Supp. 882 (S.D. N.Y. 1974).

- 23 U.S.—*Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000); *Foster v. Booker*, 595 F.3d 353 (6th Cir. 2010).
Significant risk of prolonging incarceration
U.S.—*Daniel v. Fulwood*, 766 F.3d 57 (D.C. Cir. 2014).
Sufficient risk of increasing punishment not established
U.S.—*Ridenour v. Collins*, 692 F. Supp. 2d 827 (S.D. Ohio 2010).
No evidence that longer period of incarceration resulted
U.S.—*Mubashshir v. Bradshaw*, 525 Fed. Appx. 346 (6th Cir. 2013).
Risk of increased punishment attributable to statutory changes
Inmates in the custody of the Michigan Department of Corrections, who were sentenced to life imprisonment with the possibility of parole, failed to show that any significant risk they faced of increased punishment under the Michigan's new parole regime was attributable to statutory changes to the parole process and not a change in the way Michigan Parole Board legitimately exercised its discretion as required to make out an ex post facto claim based on statutory changes to the Michigan parole regime.
U.S.—*Foster v. Booker*, 595 F.3d 353 (6th Cir. 2010).
- 24 U.S.—*U.S. v. Paskow*, 11 F.3d 873 (9th Cir. 1993).
- 25 U.S.—*Gonzalez-Fuentes v. Molina*, 607 F.3d 864 (1st Cir. 2010).
- 26 U.S.—*U. S. ex rel. Forino v. Garfinkel*, 166 F.2d 887 (C.C.A. 3d Cir. 1948).

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16A C.J.S. Constitutional Law § 687

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

b. Laws Increasing Punishment

(2) Pardon, Parole, and Conditional Release Laws

§ 687. Board or commission guidelines and rules or regulations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑2823

Generally, a parole board or commission's denial of parole to one who is eligible therefor cannot, under traditional principles, be said to increase the punishment and thereby violate the Ex Post Facto Clause, and parole board or commission guidelines do not operate unconstitutionally as ex post facto laws where the board or commission applies standards which were in effect at the time the prisoner was sentenced.

Generally, a parole board or commission's denial of parole to one who is eligible therefor cannot, under traditional principles, be said to increase the punishment and thereby violate the Ex Post Facto Clause,¹ and parole board or commission guidelines do not operate unconstitutionally as ex post facto laws where the board or commission applies standards which were in effect at the time the prisoner was sentenced.² In any event, the adoption and amendment of parole guidelines are not unconstitutional as a violation of the ex post facto clause where they do not increase the punishment for a crime³ and where the adoption and amendment of such guidelines is a procedural change.⁴

Furthermore, it has been broadly stated that changes in administrative guidelines relating to the parole authority's discretion in establishing the period of confinement or determining parole suitability do not have the force and effect of laws subject to the ex post facto doctrine.⁵ In more particular terms, where such guidelines merely clarify the exercise of administrative discretion⁶ without altering any existing considerations for parole release,⁷ the prohibition against the ex post facto effect of legislation does not apply to such administrative guidelines.⁸

The application by a parole board or commission of parole release guidelines to a prisoner whose commitment offense or sentencing occurred before the guidelines became effective does not amount to an ex post facto violation where the law at the time the crime was committed did not give the prisoner any expectation of any particular parole system,⁹ where the guidelines effect only a procedural change,¹⁰ as where they are merely procedural guideposts,¹¹ without the characteristics of laws;¹² where they merely curb¹³ or rationalize¹⁴ the discretion of the parole board, which existed prior to the enactment of the guidelines,¹⁵ and do not impose additional punishment;¹⁶ or where they are not applied in a fixed and mechanical manner.¹⁷

A rule adopted by a board of pardons enabling it to use its discretionary power to deny a pardon without a hearing does not violate the ex post facto clause.¹⁸ On the other hand, the denial to a prisoner, who had been sentenced to imprisonment under provisions making him or her immediately eligible for parole, of any meaningful opportunity for parole by the retroactive application of a parole commission rule providing for parole hearings every specified number of months violates the Ex Post Facto Clause.¹⁹

Application of guidelines in effect at time parole revoked.

A parole commission does not violate the prohibition against ex post facto laws by applying guidelines in effect at the time the parolee's parole is revoked rather than the guidelines in effect when the parolee was originally sentenced²⁰ where the guidelines operate only to provide a framework for the commission's exercise of its statutory discretion,²¹ and they neither deprive the parolee of any preexisting right²² nor enhance the punishment imposed.²³

CUMULATIVE SUPPLEMENT

Cases:

Prisoner can establish that application of more recent parole guidelines creates significant risk of prolonging his incarceration, in violation of Ex Post Facto Clause, by identifying facial distinctions between old and new guidelines that demonstrate requisite risk or by introducing evidence drawn from guidelines practical implementation by agency charged with exercising discretion. U.S. Const. art. 1, § 9, cl. 3. *Johnson v. District of Columbia*, 927 F.3d 539 (D.C. Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 **Flexible; individualized consideration**
As long as a parole grant decision remains flexible and results from individualized consideration, there is no ex post facto violation in the denial of parole.
U.S.—*Joost v. U.S. Parole Commission*, 535 F. Supp. 71 (D. Kan. 1982).
- 2 U.S.—*Priore v. Nelson*, 626 F.2d 211 (2d Cir. 1980).

Severity of offense

The adoption of parole commission's guidelines which permit denial of parole based on the severity of the offense did not violate the Ex Post Facto Clause in light of the fact that the severity of the offense was a factor that could be considered before the guidelines were adopted.

U.S.—*Joost v. U.S. Parole Commission*, 535 F. Supp. 71 (D. Kan. 1982).

Fla.—*Gatto v. Florida Parole and Probation Com'n*, 415 So. 2d 869 (Fla. 1st DCA 1982).

Fla.—*Gatto v. Florida Parole and Probation Com'n*, 415 So. 2d 869 (Fla. 1st DCA 1982).

As to laws affecting procedure as not ex post facto, generally, see § 690.

Upward revision

The upward revision of its guidelines by a parole commission did not constitute an improper ex post facto law.

U.S.—*Richards v. Crawford*, 437 F. Supp. 453 (D. Conn. 1977).

U.S.—*Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977).

U.S.—*Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977).

U.S.—*Wilson v. U.S. Parole Commission*, 460 F. Supp. 73 (D. Minn. 1978).

U.S.—*Hayward v. U. S. Parole Commission*, 659 F.2d 857 (8th Cir. 1981).

U.S.—*Stroud v. U.S. Parole Commission*, 668 F.2d 843 (5th Cir. 1982).

U.S.—*Rifai v. U.S. Parole Commission*, 586 F.2d 695 (9th Cir. 1978).

U.S.—*Ruip v. U.S.*, 555 F.2d 1331 (6th Cir. 1977).

U.S.—*Paunetto v. Hammock*, 516 F. Supp. 1367 (S.D. N.Y. 1981).

U.S.—*Warren v. U.S. Parole Commission*, 659 F.2d 183, 61 A.L.R. Fed. 111 (D.C. Cir. 1981).

U.S.—*Paunetto v. Hammock*, 516 F. Supp. 1367 (S.D. N.Y. 1981).

U.S.—*Paunetto v. Hammock*, 516 F. Supp. 1367 (S.D. N.Y. 1981).

Fla.—*Overfield v. Florida Parole and Probation Com'n*, 418 So. 2d 321 (Fla. 1st DCA 1982).

U.S.—*Zeidman v. U.S. Parole Commission*, 593 F.2d 806 (7th Cir. 1979).

Increased period of incarceration

The record demonstrated that the prisoner received individualized consideration from the parole commission in applying new parole guidelines to him, and therefore, the fact that the change in the customary release dates established by the guidelines between the time of the defendant's sentence and his initial parole hearing increased the recommended period of incarceration did not violate the Ex Post Facto Clause of the United States Constitution.

U.S.—*U.S. v. Tully*, 521 F. Supp. 331 (D.N.J. 1981).

La.—*Richey v. Hunter*, 407 So. 2d 427 (La. Ct. App. 1st Cir. 1981).

U.S.—*Rodriguez v. U.S. Parole Commission*, 594 F.2d 170 (7th Cir. 1979).

U.S.—*Portley v. Grossman*, 444 U.S. 1311, 100 S. Ct. 714, 62 L. Ed. 2d 723 (1980).

Procedural change

A change in the guidelines assisting the commission in exercise of its discretion is in the nature of a procedural change.

U.S.—*Portley v. Grossman*, 444 U.S. 1311, 100 S. Ct. 714, 62 L. Ed. 2d 723 (1980).

U.S.—*Portley v. Grossman*, 444 U.S. 1311, 100 S. Ct. 714, 62 L. Ed. 2d 723 (1980).

U.S.—*Portley v. Grossman*, 444 U.S. 1311, 100 S. Ct. 714, 62 L. Ed. 2d 723 (1980).

16A C.J.S. Constitutional Law § 688

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

c. Laws Depriving Accused of Substantial Right or Immunity; Laws Affecting Procedure

§ 688. Retroactive laws depriving accused of substantial right or immunity, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2826, 2827

A law which deprives the accused of any substantial right or immunity possessed before its passage is ex post facto as to prior offenses.

Generally, an "ex post facto law" is one which applies retroactively to disadvantage an offender's substantial rights.¹ A law which deprives the accused of any substantial right or immunity possessed by him or her before its passage is ex post facto as to prior offenses.² Accused persons are deprived of substantial rights by statutes authorizing conviction of an offense included in that charged³ or increasing the penalty of a bond essential to the suspension of sentence of a convicted person.⁴

Period of limitations.

A statute authorizing the prosecution of prior offenses after the preexisting period of limitation has run is ex post facto,⁵ but the period of limitation is subject to enlargement before it has run.⁶ Furthermore, statutes of limitations may be changed or repealed

without violating the constitutional prohibitions against ex post facto laws in any case where the right to acquittal has not been absolutely acquired by the completion of the period of limitations.⁷

Statutes affecting matters pertaining to juries and jury trial.

Accused persons are deprived of substantial rights by retrospective statutes which deprive them of the right to trial by jury,⁸ or under some,⁹ but not other,¹⁰ authorities, by such statutes which reduce the number of trial jurors or which reduce the number of jurors necessary to render a verdict.¹¹ Because peremptory strikes are procedural and not substantive in nature, alleged retroactive application of a statutory amendment changing the number of peremptory strikes to which a defendant is entitled does not violate the prohibition on ex post facto laws.¹²

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Footnotes

- 1 Ind.—[Armstrong v. State](#), 848 N.E.2d 1088 (Ind. 2006).
 - 2 N.Y.—[People v. Martinez](#), 82 Misc. 2d 56, 368 N.Y.S.2d 699 (Sup 1975).
Wyo.—[In Interest of Jones](#), 500 P.2d 690 (Wyo. 1972).
 - 3 N.Y.—[People v. Cox](#), 67 A.D. 344, 73 N.Y.S. 774 (3d Dep't 1901).
 - 4 Neb.—[State v. McCoy](#), 87 Neb. 385, 127 N.W. 137 (1910).
 - 5 Ala.—[Tyson v. Johns-Manville Sales Corp.](#), 399 So. 2d 263 (Ala. 1981).
 - 6 U.S.—[U. S. ex rel. Massarella v. Elrod](#), 682 F.2d 688 (7th Cir. 1982).
Ill.—[People v. Massarella](#), 80 Ill. App. 3d 552, 36 Ill. Dec. 16, 400 N.E.2d 436 (1st Dist. 1979).
- Clear indication**
- The legislature can extend a criminal limitations period without violating the constitutional prohibition against ex post facto laws if it does so before prosecution is barred by the old statute and clearly indicates that the new statute is to apply to cases pending when it becomes effective.
- 7 Fla.—[Andrews v. State](#), 392 So. 2d 270 (Fla. 2d DCA 1980).
Tex.—[Vasquez v. State](#), 557 S.W.2d 779 (Tex. Crim. App. 1977) (overruled on other grounds by, [Proctor v. State](#), 967 S.W.2d 840 (Tex. Crim. App. 1998)).
 - 8 La.—[State ex rel. Sherburne v. Baker](#), 50 La. Ann. 1247, 24 So. 240 (1898).
 - 9 Ga.—[McSears v. State](#), 247 Ga. 48, 273 S.E.2d 847 (1981).
 - 10 Ariz.—[State v. McIntosh](#), 23 Ariz. App. 246, 532 P.2d 188 (Div. 1 1975).
Conn.—[State v. Maresca](#), 173 Conn. 450, 377 A.2d 1330 (1977).
 - 11 La.—[State v. Ardoin](#), 51 La. Ann. 169, 24 So. 802 (1899).
 - 12 Ga.—[Madison v. State](#), 281 Ga. 640, 641 S.E.2d 789 (2007).

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16A C.J.S. Constitutional Law § 689

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VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

c. Laws Depriving Accused of Substantial Right or Immunity; Laws Affecting Procedure

§ 689. Penal administration or prison discipline

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2800, 2828

Statutes and administrative regulations or actions which relate to penal administration or prison discipline generally are not ex post facto as to offenses previously committed, but a statute reducing the amount of good time which can be earned by prisoners violates the ex post facto clause as applied to one whose crime occurred before its effective date.

Statutes which relate to penal administration or prison discipline generally, in the sense that they merely provide for the enforcement of the sentences of convicted persons, are not ex post facto as to offenses previously committed¹ even though, under some authority, their effect may be to change substantially the nature and conditions of the incarceration and thereby increase the severity of the punishment.²

On the other hand, a statute reducing the amount of good time or gain time which can be earned by prisoners violates the Ex Post Facto Clause as applied to one whose crime occurred before its effective date,³ and the same is true as to a statute adding additional grounds on which accumulated good time credits may be forfeited.⁴ Furthermore, an amendatory statute is an ex

post facto law where, instead of automatically giving good time credit, it requires inmates to earn the credit.⁵ However, there is no constitutional ex post facto violation in applying a statute denying a diminution of sentence for good time where the statute was enacted before the crime occurred.⁶ Neither is there an ex post facto violation where a state changes the power to decide or adjudicate forfeiture of release time credits from one agency to another.⁷

Administrative regulations or actions.

Administrative regulations which relate to a correctional facility's internal rehabilitation program are not subject to the constitutional prohibitions against ex post facto laws.⁸ Similarly, administrative actions with respect to prison administration generally do not come within the ambit of the Ex Post Facto Clause.⁹ Furthermore, where time computations made by a department of correction in regard to a prisoner's sentence merely reflect the law as it exists, they do not have the force and effect of law and do not amount to an ex post facto application of a new law.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Defendant received no punishment on resentencing in addition to what was permitted under prior version of sentencing statute, and thus, did not violate ex post facto provisions, on resentencing after appeal from convictions of felony rape, felony criminal deviate conduct, and felony burglary; the aggregate sentence for all three causes that defendant received under prior version of sentencing statute was 120 years, the aggregate sentence received under the amended version of the statute was 95 years, and defendant received a more lenient sentence under the amended version of the statute. U.S. Const. art. 1, § 9, 10; [Ind. Code Ann. § 35-50-1-2\(a\)](#). [Hobbs v. State](#), 161 N.E.3d 380 (Ind. Ct. App. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 Fla.—[Lundon v. Chapman](#), 151 Fla. 336, 9 So. 2d 723 (1942).
Place of confinement
- 2 Vt.—[Rebideau v. Moeykens](#), 132 Vt. 49, 312 A.2d 926 (1973).
- 3 Del.—[State ex rel. duPont v. Ingram](#), 293 A.2d 289 (Del. 1972).
- 4 U.S.—[Weaver v. Graham](#), 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).
- 5 Del.—[Johnson v. State](#), 472 A.2d 1311 (Del. 1983).
- 6 **Statute requiring submission of DNA sample before being discharged**
- 7 Neb.—[Shepard v. Houston](#), 289 Neb. 399, 855 N.W.2d 559 (2014).
- 8 U.S.—[Spradling v. Maynard](#), 527 F. Supp. 398 (W.D. Okla. 1981).
- 9 U.S.—[Barksdale v. Blackburn](#), 670 F.2d 22 (5th Cir. 1982).
- 10 Ariz.—[State v. Valenzuela](#), 144 Ariz. 43, 695 P.2d 732 (1985).
- Furlough eligibility**
- U.S.—[Milhouse v. Levi](#), 548 F.2d 357 (D.C. Cir. 1976).
- Residential drug and alcohol program**
- The Bureau of Prison's policy canceling a Spanish Residential Drug and Alcohol Program (RDAP) did not alter the definition of criminal conduct or increase a prisoner's punishment, as would violate the Ex Post Facto Clause, where the prisoner's sentence, which did not contemplate participation in RDAP or early

release, did not increase because of the policy, and the prisoner was not barred outright from the possibility of completing RDAP.

U.S.—[Santiago-Lebron v. Florida Parole Com'm](#), 767 F. Supp. 2d 1340 (S.D. Fla. 2011).

9 **Double celling of prisoners**

U.S.—[Glynn v. Auger](#), 678 F.2d 760 (8th Cir. 1982).

10 Ariz.—[State v. Thomas](#), 131 Ariz. 547, 642 P.2d 892 (Ct. App. Div. 1 1982).

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16A C.J.S. Constitutional Law § 690

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

c. Laws Depriving Accused of Substantial Right or Immunity; Laws Affecting Procedure

§ 690. Laws affecting procedure, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2793

The inhibition on the passage of ex post facto laws does not give the accused the right to be tried in all respects by the law in force when the crime charged was committed, and a law which relates merely to matters of procedure and does not deprive the accused of any substantial rights is not ex post facto.

The inhibition on the passage of ex post facto laws does not give the accused the right to be tried in all respects by the law in force when the crime charged was committed¹ since the constitutional ex post facto provision is not intended to limit legislative control of remedies and modes of procedure which do not affect matters of substance.² Accordingly, a law relating to matters of procedure merely, and not depriving the accused of any substantial right or protection, is not ex post facto,³ even though it may work to the disadvantage of the accused,⁴ but the alteration of a substantial right is not merely procedural even if the statute takes a seemingly procedural form.⁵ Moreover, a statute which takes from the accused a substantial right given to him or her by the law in force at the time of the alleged commission of the offense is ex post facto in its nature and operation and cannot be sustained simply because in a general sense it may be said to regulate procedure.⁶

Furthermore, a statute is not merely procedural because it is denominated as such,⁷ and whether a procedural change amounts to an ex post facto law depends on its effect on the accused.⁸ In any event, the distinction between a procedural change which violates the ex post facto prohibition and one which does not is a matter of degree,⁹ and each case must be decided on its own facts.¹⁰

In more particular terms, statutory changes are procedural and thus not ex post facto if they neither make criminal a theretofore innocent act¹¹ nor aggravate a crime previously committed,¹² nor provide greater punishment,¹³ nor change the proof necessary to convict.¹⁴

The courts have held many particular retrospective laws or rules of court to relate merely to procedure and therefore not to be ex post facto, such as statutes or rules relating to speedy trial¹⁵ and a rule requiring the accused to give notice of his or her alibi.¹⁶ Rules of court held to be merely procedural for purposes of the rule against ex post facto laws also include those imposing a court facilities assessment,¹⁷ changing various matters relating to jurors or juries,¹⁸ changing the number of peremptory challenges allowed the accused or the prosecution,¹⁹ changing the place of trial,²⁰ or making the granting of separate trials of persons jointly indicted a matter of discretion rather than of right.²¹

Similarly, the constitutional inhibition against ex post facto laws is not violated by retrospective laws authorizing the court to order the separate trial of separate offenses in certain cases,²² providing for the furnishing of a bill of particulars by the prosecution,²³ providing a summary method for the collection of a fine,²⁴ providing an additional method for determining whether the accused had previously committed a felony,²⁵ or permitting an accessory, who was punishable as if a principal, to be indicted for the crime itself.²⁶

Furthermore, the constitutional inhibition against ex post facto laws is not violated by retrospective laws requiring the defense of insanity to be set up by special plea,²⁷ extending the time for pronouncement of sentence until after a probationary proceeding has been disposed of,²⁸ changing the constitution²⁹ or jurisdiction³⁰ of courts for the trial of offenses, allowing bail, pending an appeal,³¹ or authorizing the calling of a special term of court at which to sentence a convicted person.³²

Revival of time-barred prosecution.

A state law enacted after the expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution.³³

CUMULATIVE SUPPLEMENT

Cases:

Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. *U.S.C.A. Const. Art. 1, § 9, cl. 3*; *Const. Art. 1, § 16. Dunlap v. State*, 360 P.3d 289 (Idaho 2015).

Two-dollar public defender records and automation fee and \$2 State's attorney record automation fee, imposed as part of sentence for attempted first-degree murder and aggravated battery with firearm, were not "fines" designed to punish defendant for his crimes, and thus, did not implicate prohibition against ex post facto laws. *U.S.C.A. Const. Art. 1, § 10, cl. 1*; *S.H.A. 55 ILCS 5/3–4012, 5/4–2002.1(c). People v. Taylor*, 2016 IL App (1st) 141251, 408 Ill. Dec. 292, 65 N.E.3d 514 (App. Ct. 1st Dist. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).
- 2 U.S.—*Portley v. Grossman*, 444 U.S. 1311, 100 S. Ct. 714, 62 L. Ed. 2d 723 (1980); *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).
La.—*Richey v. Hunter*, 407 So. 2d 427 (La. Ct. App. 1st Cir. 1981).
- 3 U.S.—*Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).
Cal.—*People v. Sandoval*, 41 Cal. 4th 825, 62 Cal. Rptr. 3d 588, 161 P.3d 1146 (2007).
Minn.—*Rew v. Bergstrom*, 845 N.W.2d 764 (Minn. 2014).
Wash.—*In re Personal Restraint of Dyer*, 164 Wash. 2d 274, 189 P.3d 759 (2008).
- 4 U.S.—*Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).
Ark.—*Lard v. State*, 2014 Ark. 1, 431 S.W.3d 249 (2014), petition for certiorari filed, 135 S. Ct. 76, 190 L. Ed. 2d 67 (2014).
Fla.—*Shenfeld v. State*, 44 So. 3d 96 (Fla. 2010).
- 5 U.S.—*Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).
- 6 U.S.—*Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).
Okla.—*J. M. R. v. Moore*, 1980 OK CR 9, 610 P.2d 811 (Okla. Crim. App. 1980).
Constitutional rights
States may not bar the assertion of constitutional rights by ex post facto procedural rules.
U.S.—*Hardin v. Estelle*, 365 F. Supp. 39 (W.D. Tex. 1973), judgment aff'd, 484 F.2d 944 (5th Cir. 1973).
- 7 N.Y.—*People v. Tyler*, 99 Misc. 2d 400, 416 N.Y.S.2d 197 (N.Y. City Crim. Ct. 1979).
- 8 N.Y.—*People v. Bresalier*, 97 Misc. 2d 157, 411 N.Y.S.2d 110 (N.Y. City Crim. Ct. 1978).
W. Va.—*State v. R. H.*, 166 W. Va. 280, 273 S.E.2d 578 (1980) (overruled on other grounds by, *State ex rel. Cook v. Helms*, 170 W. Va. 200, 292 S.E.2d 610 (1981)).
- 9 U.S.—*Beazell v. Ohio*, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925).
Cal.—*People v. Snipe*, 25 Cal. App. 3d 742, 102 Cal. Rptr. 6, 60 A.L.R.3d 1316 (5th Dist. 1972).
- 10 Cal.—*People v. Snipe*, 25 Cal. App. 3d 742, 102 Cal. Rptr. 6, 60 A.L.R.3d 1316 (5th Dist. 1972).
W. Va.—*State v. R. H.*, 166 W. Va. 280, 273 S.E.2d 578 (1980) (overruled on other grounds by, *State ex rel. Cook v. Helms*, 170 W. Va. 200, 292 S.E.2d 610 (1981)).
- 11 U.S.—*Knapp v. Cardwell*, 513 F. Supp. 4 (D. Ariz. 1980), decision aff'd, 667 F.2d 1253 (9th Cir. 1982).
Ill.—*People v. Sias*, 91 Ill. App. 3d 1095, 47 Ill. Dec. 613, 415 N.E.2d 618 (1st Dist. 1980).
- 12 U.S.—*Knapp v. Cardwell*, 513 F. Supp. 4 (D. Ariz. 1980), decision aff'd, 667 F.2d 1253 (9th Cir. 1982).
- 13 U.S.—*Knapp v. Cardwell*, 513 F. Supp. 4 (D. Ariz. 1980), decision aff'd, 667 F.2d 1253 (9th Cir. 1982).
Idaho—*State v. Shackelford*, 150 Idaho 355, 247 P.3d 582 (2010).
Ill.—*People v. Sias*, 91 Ill. App. 3d 1095, 47 Ill. Dec. 613, 415 N.E.2d 618 (1st Dist. 1980).
- 14 U.S.—*Knapp v. Cardwell*, 513 F. Supp. 4 (D. Ariz. 1980), decision aff'd, 667 F.2d 1253 (9th Cir. 1982).
Ill.—*People v. Bivens*, 43 Ill. App. 3d 79, 1 Ill. Dec. 477, 356 N.E.2d 665 (5th Dist. 1976).
As to ex post facto effect of laws changing rules of evidence, generally, see § 691.
- 15 Fla.—*Kanter v. State*, 265 So. 2d 742 (Fla. 3d DCA 1972).
Ill.—*People v. Bivens*, 43 Ill. App. 3d 79, 1 Ill. Dec. 477, 356 N.E.2d 665 (5th Dist. 1976).
- 16 N.D.—*State v. Flohr*, 301 N.W.2d 367 (N.D. 1980).
- 17 Cal.—*People v. Fleury*, 182 Cal. App. 4th 1486, 106 Cal. Rptr. 3d 722 (3d Dist. 2010).
- 18 Mass.—*Com. v. Bellino*, 320 Mass. 635, 71 N.E.2d 411 (1947).
Particular matters
(1) Changing qualifications of jurors.
U.S.—*Gibson v. State of Mississippi*, 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075 (1896).

(2) Changing method of selecting or impanelling jurors.

N.J.—*State v. Donato*, 106 N.J.L. 397, 148 A. 776 (N.J. Ct. Err. & App. 1930).

(3) Giving jury right to determine amount of punishment.

Ill.—*People v. Johnson*, 23 Ill. 2d 465, 178 N.E.2d 878 (1961).

19 U.S.—*Simpson v. Wyrick*, 527 F. Supp. 1144 (W.D. Mo. 1981), *aff'd*, 685 F.2d 438 (8th Cir. 1982).

Mo.—*State v. Stokes*, 638 S.W.2d 715 (Mo. 1982).

A.L.R. Library

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment, 8 A.L.R.4th 149.

20 U.S.—*Cook v. U.S.*, 138 U.S. 157, 11 S. Ct. 268, 34 L. Ed. 906 (1891).

Right not protected

The right to be tried in a particular forum is not the sort of right the Ex Post Facto Clause protects.

U.S.—*Al Bahlul v. U.S.*, 767 F.3d 1 (D.C. Cir. 2014).

21 U.S.—*Beazell v. Ohio*, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

22 N.Y.—*People ex rel. Luciano v. Murphy*, 160 Misc. 573, 290 N.Y.S. 1011 (County Ct. 1936), *aff'd*, 249 A.D. 879, 292 N.Y.S. 844 (3d Dep't 1937).

23 Ohio—*State v. Whitmore*, 126 Ohio St. 381, 185 N.E. 547 (1933) (overruled in part on other grounds by, *Eastman v. State*, 131 Ohio St. 1, 5 Ohio Op. 248, 1 N.E.2d 140 (1936)).

24 Va.—*Gilreath v. Com.*, 136 Va. 709, 118 S.E. 100 (1923).

25 N.Y.—*People ex rel. Taylor v. Jennings*, 134 Misc. 586, 236 N.Y.S. 161 (Sup 1929).

26 Mass.—*Com. v. Kelley*, 184 Mass. 320, 68 N.E. 346 (1903).

27 Ala.—*Perry v. State*, 87 Ala. 30, 6 So. 425 (1889).

28 Cal.—*People v. Williams*, 24 Cal. 2d 848, 151 P.2d 244 (1944).

29 Mass.—*Commonwealth v. Phelps*, 210 Mass. 78, 96 N.E. 349 (1911).

30 Iowa—*State v. Wilson*, 193 Iowa 297, 186 N.W. 886 (1922).

Offense already punishable in one court

Where an offense is already punishable in one court, a law is not ex post facto which makes it punishable in another court.

Iowa—*State v. Wilson*, 193 Iowa 297, 186 N.W. 886 (1922).

31 Fla.—*Sphaler v. Colman*, 379 So. 2d 717 (Fla. 5th DCA 1980).

32 Tex.—*Ex parte Boyd*, 50 Tex. Crim. 309, 96 S.W. 1079 (1906), writ dismissed, 209 U.S. 539, 28 S. Ct. 570, 52 L. Ed. 917 (1908).

33 U.S.—*Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003).

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16A C.J.S. Constitutional Law § 691

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

c. Laws Depriving Accused of Substantial Right or Immunity; Laws Affecting Procedure

§ 691. Rules of evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2793, 2812

Laws which change the rules of evidence are ex post facto as to prior offenses only if they lessen the difficulty of conviction.

Changes to ordinary rules of evidence do not violate the Ex Post Facto Clause as such rules are ordinarily evenhanded, in the sense that they may benefit either the state or the defendant in any given case,¹ and such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence because they do not concern whether the admissible evidence is sufficient to overcome the presumption.² However, while not every law that alters the rules of evidence is an ex post facto law,³ laws which make conviction easier by changing the rules of evidence so that less or different evidence is required to convict are ex post facto as to prior offenses.⁴ Moreover, the category of ex post fact laws consisting of laws that alter the legal rules of evidence and require less evidence to obtain a conviction is not limited to laws that retrospectively alter the burden of proof but also extends to laws that reduce the quantum of evidence necessary to meet that burden.⁵

However, a law which simply enlarges the class of persons who may be competent to testify,⁶ or otherwise admits or prohibits admission of evidence not previously admissible or inadmissible,⁷ without lessening the requirements for conviction, is not ex post facto in its application to offenses previously committed. Thus, statutes have been sustained as to prior offenses which made a husband and wife competent witnesses against each other,⁸ or authorized the admission of evidence of past offenses,⁹ although, as to the latter rule, there is also authority to the contrary.¹⁰

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Footnotes

- 1 U.S.—*Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).
Neb.—*State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).
- 2 U.S.—*Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).
- 3 U.S.—*Hopt v. People*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884).
Ind.—*Sumpter v. State*, 264 Ind. 117, 340 N.E.2d 764 (1976).
- 4 U.S.—*Gentry v. Sinclair*, 705 F.3d 884 (9th Cir. 2013), petition for certiorari filed, 134 S. Ct. 102, 187 L. Ed. 2d 75 (2013).
Cal.—*John L. v. Superior Court*, 33 Cal. 4th 158, 14 Cal. Rptr. 3d 261, 91 P.3d 205 (2004).
Ill.—*People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 330 Ill. Dec. 761, 909 N.E.2d 783 (2009).
Ky.—*Com. v. Brown*, 619 S.W.2d 699 (Ky. 1981) (overruled on other grounds by, *Murphy v. Com.*, 652 S.W.2d 69 (Ky. 1983)).
As to definition to same effect, see § 671.
Reduction of prosecution's burden of persuasion
Kan.—*State v. Prine*, 297 Kan. 460, 303 P.3d 662 (2013).
Statutes abolishing corroboration requirements
U.S.—*Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).
Idaho—*State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).
Statute concerning burden and quantum of proof as to insanity
U.S.—*U.S. v. Williams*, 475 F.2d 355 (D.C. Cir. 1973).
- 5 U.S.—*Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); *Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011).
- 6 U.S.—*Hopt v. People*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884).
Cal.—*Dewoody v. Superior Court*, 8 Cal. App. 3d 52, 87 Cal. Rptr. 210 (3d Dist. 1970).
- 7 U.S.—*Thompson v. State of Missouri*, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898).
N.Y.—*People v. Nival*, 33 N.Y.2d 391, 353 N.Y.S.2d 409, 308 N.E.2d 883 (1974).
Past sexual conduct of rape or sexual assault victim
Ill.—*People v. Dorff*, 77 Ill. App. 3d 882, 33 Ill. Dec. 300, 396 N.E.2d 827 (3d Dist. 1979).
Ind.—*Finney v. State*, 179 Ind. App. 316, 385 N.E.2d 477 (1979).
Victim impact evidence in trials for capital crimes
Cal.—*People v. Jurado*, 38 Cal. 4th 72, 41 Cal. Rptr. 3d 319, 131 P.3d 400 (2006).
Confessions
U.S.—*Wilson v. Estelle*, 504 F.2d 562 (5th Cir. 1974).
Prior consistent statements
The modification of an evidentiary rule dealing with the admission of prior consistent statements did not fall within the ex post facto ban, where the ruling below allowing the admission was correct as a matter of law, so that prejudice to the accused was insubstantial, the burden of proof was not made less onerous by the decision, and the accused would not likely have used different trial tactics had he forecast the decision.
Vt.—*State v. Roy*, 140 Vt. 219, 436 A.2d 1090 (1981).
Admission of expert testimony
Although, under the law at the time of trial, it was error to permit doctors to testify as to opinion which was based on facts not in evidence, a later decision of the state supreme court that the test is whether the information relied upon by an expert is of a kind normally relied upon by experts in the particular field

in question could be applied retroactively without violating the constitutional prohibition against ex post facto laws.

Ariz.—[State v. Steelman](#), 120 Ariz. 301, 585 P.2d 1213 (1978).

8 Ark.—[Huckaby v. State](#), 262 Ark. 413, 557 S.W.2d 875 (1977).

9 Ga.—[Solomon v. State](#), 247 Ga. 27, 277 S.E.2d 1 (1980).

Penalty enhancement, habitual criminal, multiple offender, or recidivist laws, generally, see § 679.

Sentencing procedure

U.S.—[Todd v. Stynchcombe](#), 486 F.2d 1030 (5th Cir. 1973).

10 U.S.—[U.S. v. Henson](#), 486 F.2d 1292 (D.C. Cir. 1973).

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16A C.J.S. Constitutional Law § 692

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

d. Laws Imposing Civil Disabilities and Forfeitures

§ 692. Laws imposing civil disabilities and forfeitures, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2820 to 2822, 2838, 2840 to 2845

Laws imposing civil disabilities or forfeitures as punishment for past offenses are ex post facto, but statutes denying the right to vote or hold office because of past acts, and statutes prospectively prescribing qualifications for a profession or occupation, are not.

A law the object of which is the punishment of past offenses is ex post facto even though the penalty is merely a civil disability¹ if it alters the situation of the accused to his or her disadvantage.² Thus, statutes which provide for the forfeiture of property by civil process as a punishment for past offenses are unconstitutional.³ On the other hand, it has been declared that because deprivation of civil privilege is used as a punishment, it does not follow that every deprivation is punishment in the sense of being ex post facto.⁴

Test oaths.

Statutes and constitutional provisions making it necessary for persons to take an oath of past loyalty to the government as a condition of being allowed to exercise certain trades, callings, or professions,⁵ or as a condition of being allowed to prosecute or defend a civil action,⁶ are ex post facto.

Denying right to vote.

Since the right to vote is not a civil right but only a political privilege, a statute denying such right for the commission of acts in the past is not an ex post facto law.⁷

Right to hold office.

Statutes denying the right to hold office on account of acts committed in the past,⁸ or on account of having previously held the same office,⁹ are not ex post facto. Furthermore, where a person by reason of having been convicted of a crime is ineligible to hold a particular office under a then existing constitutional provision, the application to him or her of a subsequently enacted constitutional amendment, which does not significantly alter his or her rights as they existed at the time of his or her conviction, does not present an ex post facto question.¹⁰

Prospective statutes.

Statutes which merely prescribe qualifications for persons thereafter admitted to a profession¹¹ or occupation,¹² or forbid their continuing therein because of acts thereafter committed,¹³ are not ex post facto laws.

Right to engage in activity.

A statute which makes the right to engage in an activity in the future depend on past behavior, even behavior before passage of the regulatory act, is not invalid as an ex post facto law if the statute seeks not to punish a person for his or her past acts but to regulate a present situation¹⁴ or is otherwise a bona fide regulation of an activity which the legislature has the power to regulate, and the past conduct indicates unfitness to participate in the activity.¹⁵

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Footnotes

- 1 U.S.—*Ex parte Garland*, 71 U.S. 333, 18 L. Ed. 366, 32 How. Pr. 241, 1866 WL 9477 (1866); *Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866).
Ala.—*Hickman v. City of Mobile*, 256 Ala. 141, 53 So. 2d 752 (1951).
A.L.R. Library
Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, of comparable revenues to criminals, 60 A.L.R.4th 1210.
- 2 **Restoration of citizenship**
An enactment vesting the right of restoration of citizenship of a felon in the governor, when the right was not in the governor at the time of the commission of a felony, is not ex post facto.
U.S.—*Andrus v. McCauley*, 21 F. Supp. 70 (E.D. Wash. 1936).
- 3 U.S.—*Burgess v. Salmon*, 97 U.S. 381, 24 L. Ed. 1104, 1878 WL 18314 (1878).
- 4 Ohio—*Papatheodoro v. State Dept. of Liquor Control*, 69 Ohio L. Abs. 556, 118 N.E.2d 713 (C.P. 1954).
- 5 U.S.—*Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866).
- 6 U.S.—*Pierce v. Carskadon*, 83 U.S. 234, 21 L. Ed. 276, 1872 WL 15376 (1872).

- 7 Idaho—[Shepherd v. Grimmett](#), 2 Idaho 1123, 31 P. 793 (1892).
Disqualification for existing violation
U.S.—[Murphy v. Ramsey](#), 114 U.S. 15, 5 S. Ct. 747, 29 L. Ed. 47 (1885).
- 8 Ind.—[Crampton v. O'Mara](#), 193 Ind. 551, 139 N.E. 360 (1923) (overruled on other grounds by, [Snyder v. King](#), 958 N.E.2d 764 (Ind. 2011)).
A.L.R. Library
Validity and construction of orders and enactments requiring public officers and employees, or candidates for office, to disclose financial condition, interests, or relationships, 22 A.L.R.4th 237, § 7.
- 9 Ala.—[State v. Teasley](#), 194 Ala. 574, 69 So. 723 (1915).
- 10 La.—[Cardon v. Dauterive](#), 264 So. 2d 806 (La. Ct. App. 4th Cir. 1972), writ refused, 262 La. 968, 265 So. 2d 240 (1972).
- 11 U.S.—[Hiss v. Hampton](#), 338 F. Supp. 1141 (D.D.C. 1972).
- 12 Me.—[Watson v. State Commissioner of Banking](#), 223 A.2d 834 (Me. 1966).
Public employee loyalty oath
U.S.—[Ohlson v. Phillips](#), 304 F. Supp. 1152 (D. Colo. 1969), judgment aff'd, 397 U.S. 317, 90 S. Ct. 1124, 25 L. Ed. 2d 337 (1970).
Okla.—[Board of Regents of Okl. Agr. Colleges v. Updegraff](#), 1951 OK 270, 205 Okla. 301, 237 P.2d 131 (1951), judgment rev'd on other grounds, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952).
- 13 **Failure to meet more rigid standards**
The legislature, by enacting a regulation, may prescribe qualifications as to the character and education required for persons to practice a certain occupation and thereby require those in practice who fail to meet such requirements to give up their occupation, subject only to the limitation that the regulation be reasonable and bear some relation to the service to be rendered by the practitioner.
Tenn.—[Davis v. Beeler](#), 185 Tenn. 638, 207 S.W.2d 343 (1947).
- 14 N.Y.—[Hodes v. Axelrod](#), 84 A.D.2d 895, 444 N.Y.S.2d 769 (3d Dep't 1981), judgment rev'd on other grounds, 56 N.Y.2d 930, 453 N.Y.S.2d 607, 439 N.E.2d 323 (1982).
- 15 U.S.—[U.S. v. Karnes](#), 437 F.2d 284 (9th Cir. 1971).

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16A C.J.S. Constitutional Law § 693

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

d. Laws Imposing Civil Disabilities and Forfeitures

§ 693. Taxation

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2839

Taxation statutes are not ex post facto if prospective in operation, or civil, and not criminal, and a statute which prescribes a more effective procedure for collecting back taxes, or requires interest on past-due taxes, is not ex post facto, but statutes imposing taxes retroactively or penalizing a prior failure to list property or pay taxes are ex post facto.

Generally, the prohibition against ex post facto laws applies only to penalties and, therefore, does not apply to taxes.¹ A statute is not ex post facto merely because it authorizes or prescribes more effective procedure for the collection of back taxes or taxes on omitted property,² or requires the payment of interest on past-due taxes,³ or levies taxes based on transactions occurring after its passage but before its effective date.⁴

Statutes relating to taxation are not ex post facto laws if they are prospective in their operation⁵ or are civil, and not criminal, laws.⁶

A statute imposing a penalty for a prior failure to list property or pay taxes is ex post facto and void,⁷ but a statute providing for the forfeiture of property for a subsequent failure to list it for back taxes is not ex post facto as the penalty is imposed not for the prior omission but for the subsequent failure to list.⁸ Under some authority, a retroactive ordinance as to taxes falls under the constitutional prohibition of ex post facto laws.⁹

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Footnotes

- 1 Wash.—*In re Estate of Hambleton*, 181 Wash. 2d 802, 335 P.3d 398 (2014).
- 2 Ky.—*Ficke v. Board of Trustees of Erlanger Consol. Graded School Dist.*, 262 Ky. 312, 90 S.W.2d 66 (1936).
Acts curing defects in levy and assessment of municipal taxes, see § 667.
Extending limitation on time for collection of sales taxes
Ala.—*State, Dept. of Revenue v. Lindsey*, 343 So. 2d 535 (Ala. Civ. App. 1977).
- 3 Wis.—*State v. Lyons*, 183 Wis. 107, 197 N.W. 578 (1924).
- 4 Fla.—*State ex rel. Jacksonville Gas Co. v. Lee*, 112 Fla. 109, 150 So. 225 (1933).
- 5 Neb.—*In re Rogers' Estate*, 147 Neb. 1, 22 N.W.2d 297 (1946).
- 6 Va.—*Alderson v. County Of Alleghany*, 266 Va. 333, 585 S.E.2d 795 (2003).
As to prohibition against ex post facto laws as applicable only to criminal laws, generally, see § 675.
Reducing period of redemption
Mich.—*Baker v. State Land Office Bd.*, 294 Mich. 587, 293 N.W. 763 (1940).
- 7 Ky.—*Muir's Adm'rs v. City of Bardstown*, 120 Ky. 739, 27 Ky. L. Rptr. 1150, 87 S.W. 1096 (1905).
- 8 U.S.—*Kentucky Union Co. v. Commonwealth of Kentucky*, 219 U.S. 140, 31 S. Ct. 171, 55 L. Ed. 137 (1911).
- 9 Ohio—*Clark v. City of Cincinnati*, 54 Ohio Op. 200, 69 Ohio L. Abs. 202, 121 N.E.2d 834 (C.P. 1954),
rev'd on other grounds, 99 Ohio App. 152, 58 Ohio Op. 265, 131 N.E.2d 599 (1st Dist. Hamilton County
1954), judgment aff'd, 163 Ohio St. 532, 56 Ohio Op. 438, 127 N.E.2d 363 (1955).

End of Document

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16A C.J.S. Constitutional Law § 694

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

d. Laws Imposing Civil Disabilities and Forfeitures

§ 694. Protection of public

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2800, 2802, 2843, 2844

Laws intended to protect the public are not ex post facto even though disqualifying a person, for past acts or omissions, from continuing his or her profession or business or continuing to own concealable firearms.

Generally, a statute which disqualifies a person from practicing a profession does not constitute punishment where it is necessary to protect the public, and it is not, therefore, an ex post facto law.¹ Thus, a statute intended to protect the public from unfit persons is not rendered ex post facto by the fact that it disqualifies a person, by reason of past acts or omissions, from continuing in the practice of his or her profession² or from remaining in his or her business.³

Firearms; ammunition; dangerous weapons.

Generally, statutes which, by reason of past acts, prohibit designated persons from possessing firearms; or from receipt, possession, or transportation of firearms; or from transporting in interstate commerce any firearm or ammunition; or from

possessing a dangerous weapon, are not ex post facto laws,⁴ and in any event, where it is proved that the accused received a firearm after the enactment of a statute which makes criminal the receipt of a firearm by a convicted felon, the ex post facto prohibition has no application.⁵ Furthermore, a statute proscribing a false statement in connection with the acquisition of a firearm or ammunition does not operate as an ex post facto law as applied to a convicted felon or a person allegedly convicted of a crime punishable by imprisonment for a term exceeding one year.⁶

Drivers' licenses.

A statutory amendment eliminating hardship driver's licenses for drivers whose licenses have been permanently revoked based on four prior convictions for driving under the influence does not impose criminal punishment and thus does not implicate the constitutional prohibition on ex post facto laws.⁷

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Footnotes

- 1 U.S.—[Agustin v. Quern](#), 611 F.2d 206 (7th Cir. 1979).
- 2 Or.—[Megdal v. Oregon State Bd. of Dental Examiners](#), 288 Or. 293, 605 P.2d 273 (1980).
License previously obtained by fraud
 Wis.—[State v. Schaeffer](#), 129 Wis. 459, 109 N.W. 522 (1906).
 Ohio—[Papatheodoro v. State Dept. of Liquor Control](#), 69 Ohio L. Abs. 556, 118 N.E.2d 713 (C.P. 1954).
- 3 **Particular designated persons**
- 4 (1) Persons dishonorably discharged from armed forces.
 U.S.—[U.S. v. Day](#), 476 F.2d 562 (6th Cir. 1973).
 (2) Convicted felons.
 U.S.—[U.S. v. Matassini](#), 565 F.2d 1297, 44 A.L.R. Fed. 666 (5th Cir. 1978).
 La.—[State v. Williams](#), 358 So. 2d 943 (La. 1978).
 Mo.—[State v. Harris](#), 414 S.W.3d 447 (Mo. 2013).
 (3) Persons convicted of crime of violence.
 Utah—[State v. Coleman](#), 540 P.2d 953 (Utah 1975).
- 5 U.S.—[U.S. v. Hopkins](#), 529 F.2d 775 (8th Cir. 1976).
- 6 U.S.—[Cody v. U.S.](#), 460 F.2d 34 (8th Cir. 1972).
- 7 Fla.—[Lescher v. Florida Dept. of Highway Safety and Motor Vehicles](#), 985 So. 2d 1078 (Fla. 2008).

End of Document

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16A C.J.S. Constitutional Law § 695

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

C. Ex Post Facto Laws

2. Retroactive Operation of Ex Post Facto Laws

d. Laws Imposing Civil Disabilities and Forfeitures

§ 695. Protection of public—Against sex offenders

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2820 to 2822

The courts have adjudicated the constitutionality of various statutes designed to protect the public against persons convicted of sex offenses as against contentions that they violated the prohibition against ex post facto laws.

A statute prohibiting a registered sex offender from living within 2,000 feet of designated locations is not an impermissible bill of attainder where the 2,000-foot restriction is not a punishment for the offense.¹

The civil commitment of convicted sex offenders adjudicated sexually violent predators does not violate the prohibition against ex post facto laws since a statute authorizing such commitment is nonpunitive² and does not address the objectives of criminal punishment of retribution or deterrence.³

Similarly, the registration and notification requirements of a sex offender statute, which require convicted sex offenders to register with law enforcement agencies and for information about sex offenders to be posted on the Internet, are regulatory and

procedural and nonpunitive in nature and, thus, do not violate the Ex Post Facto Clause.⁴ Moreover, a statute criminalizing the failure to register as sex offender does not violate the prohibition against ex post facto laws where the failure to register is a felony entirely distinct from the prior conviction for a qualifying sex offense so that the statute does not increase the punishment for the sex offense.⁵

On the other hand, an amended statute authorizing the imposition of lifetime community supervision for aggravated offenses has been struck down as an impermissible ex post facto law as applied to a defendant convicted on a no contest plea of first-degree sexual assault that was committed prior to the effective date of the amendment.⁶

CUMULATIVE SUPPLEMENT

Cases:

The Court-Ordered Involuntary Treatment of Certain Sexually Violent Persons statute, as it relates to a sexually violent delinquent child (SVDC), does not impose criminal punishment, and thus, retroactive application of statute does not violate state or federal ex post facto clauses; although statute imposes affirmative disabilities or restraints upon SVDCs, it provides treatment rather than imposing restrictions that were historically considered punishment, and does not promote the typically punitive goals of deterrence and retribution. U.S. Const. art. 1, § 10; [Pa. Const. art. 1, § 17](#); [42 Pa. Cons. Stat. Ann. § 6401, et seq.](#) [In re H.R., 227 A.3d 316 \(Pa. 2020\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Iowa—Formaro v. Polk County, 773 N.W.2d 834 \(Iowa 2009\).](#)
A.L.R. Library
[Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders, 25 A.L.R.6th 227.](#)
- 2 [U.S.—Seling v. Young, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 \(2001\).](#)
[Va.—Shivae v. Com., 270 Va. 112, 613 S.E.2d 570 \(2005\).](#)
- 3 [U.S.—Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 \(1997\).](#)
[Va.—Shivae v. Com., 270 Va. 112, 613 S.E.2d 570 \(2005\).](#)
- 4 [U.S.—Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 \(2003\).](#)
[Del.—Smith v. State, 919 A.2d 539 \(Del. 2006\).](#)
[Fla.—Simmons v. State, 753 So. 2d 762 \(Fla. 4th DCA 2000\).](#)
A.L.R. Library
[Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions, 63 A.L.R.6th 351.](#)
[Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act \(SORNA\), 42 U.S.C.A. § § 16901 et seq., its Enforcement Provision, 18 U.S.C.A § 2250, and Associated Regulations, 30 A.L.R. Fed. 2d 213.](#)
- 5 [Ga.—Frazier v. State, 284 Ga. 638, 668 S.E.2d 646 \(2008\).](#)
A.L.R. Library
[Validity, Construction, and Application of State Statutes Imposing Criminal Penalties for Failure to Register as Required Under Sex Offender or Other Criminal Registration Statutes, 33 A.L.R.6th 91.](#)
- 6 [Neb.—State v. Simnick, 279 Neb. 499, 779 N.W.2d 335 \(2010\).](#)

16A C.J.S. Constitutional Law II VII D Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

D. Bills of Attainder

[Topic Summary](#) | [Correlation Table](#)

Research References

A.L.R. Library

A.L.R. Index, Attainder and Outlawry

A.L.R. Index, Constitutional Law

West's A.L.R. Digest, [Constitutional Law](#) 🔑 1096 to 1100

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16A C.J.S. Constitutional Law § 696

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

D. Bills of Attainder

§ 696. Bills of attainder; definitions and distinctions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1096 to 1098

Bills of attainder are legislative acts which inflict punishment without a judicial trial and are prohibited by the federal and state constitutions.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.¹ The Bill of Attainder Clause of the Federal Constitution, providing that no bill of attainder shall be passed,² prohibits the legislatures from singling out disfavored persons and meting out summary punishment for past conduct.³ In order to be a constitutionally prohibited bill of attainder, an enactment must in fact single out a particular person or group for punishment.⁴ It may be directed against named individuals, or to easily ascertained members of a group,⁵ and may inflict punishment either absolutely or conditionally.⁶ Because they are passed after the commission of the offense which is to be punished, bills of attainder have been said to be ex post facto laws.⁷

To determine whether a law imposes punishment, as required for law to be an unconstitutional bill of attainder, the courts consider three independent factors: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of the burdens imposed, reasonably can be said

to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.⁸ In this context, military detention is not "punishment."⁹

The Bill of Attainder Clause was not intended as a narrow, technical prohibition but rather as an implementation of the separation of powers doctrine as a general safeguard against legislative exercise of the judicial function.¹⁰ Under the prohibition, legislatures can provide that persons possessing certain characteristics must abstain from certain activities but must leave to other tribunals the task of deciding who possesses these characteristics.¹¹ The vice of attainder is that the legislature decides for itself that certain persons possess these characteristics and are therefore deserving of sanction.¹² The clause reflects the belief that the legislative branch, which is peculiarly susceptible to popular clamor, is not as well suited as politically independent judges and juries to the task of ruling on the blameworthiness of, and levying appropriate punishment on, specific persons.¹³ Furthermore, state and federal constitutional provisions prohibiting bills of attainder are virtually identical and substantially equivalent.¹⁴

The bill of attainder clause is rarely used to invalidate legislation.¹⁵ The prohibition was not intended to serve as a variant of the Equal Protection Clause to invalidate every legislative act which burdens some persons or groups but not all other plausible individuals.¹⁶ A law of general applicability is not a bill of attainder merely because its enactment was inspired by a specific example of the evil which it seeks to suppress.¹⁷ Legislatures may act to curb behavior which they regard as harmful to the public welfare whether such is found to be engaged in by many persons or by one.¹⁸ In so doing, legislatures can use shorthand phrases to summarize characteristics with which they are concerned.¹⁹ Indeed, the fact that an act refers specifically to one person by name does not automatically offend the clause.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Constitutional prohibitions on bills of attainder prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1. *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Garner v. Board of Public Works of City of Los Angeles*, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951); U.S. v. *Lovett*, 106 Ct. Cl. 856, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946).
Fla.—*Mayes v. Moore*, 827 So. 2d 967 (Fla. 2002).
Md.—*Young v. State*, 370 Md. 686, 806 A.2d 233 (2002).
Legislative determination of guilt as distinguishing feature
U.S.—*De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960).
N.H.—*State v. McPhail*, 116 N.H. 440, 362 A.2d 199 (1976).
Punishment imposed by court cannot be bill of attainder
U.S.—*Groppi v. Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970).
A.L.R. Library
Construction and Application of U.S. Const. Art. I, s10, cl. 1, and State Constitutional Provisions Proscribing State Bills of Attainder, 63 A.L.R.6th 1.
- 2 U.S. Const. Art. I, § 9, cl. 3.

- 3 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
Wash.—*State v. Thorne*, 129 Wash. 2d 736, 921 P.2d 514 (1996).
A.L.R. Library
Construction and Application of U.S. Const. Art. I, s 9, cl. 3, Proscribing Federal Bills of Attainder, 62 A.L.R.6th 517.
- 4 U.S.—*Hettinga v. U.S.*, 677 F.3d 471 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 860, 184 L. Ed. 2d 658 (2013).
- 5 U.S.—*Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984).
Fla.—*Mayes v. Moore*, 827 So. 2d 967 (Fla. 2002).
Md.—*Young v. State*, 370 Md. 686, 806 A.2d 233 (2002).
- 6 U.S.—*Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866).
- 7 N.Y.—*Weinstock v. Ladisky*, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup 1950).
As to ex post facto laws, generally, see §§ 671 to 695 et seq.
- 8 U.S.—*Ameur v. Gates*, 759 F.3d 317 (4th Cir. 2014); *Adams v. U.S.*, 796 F. Supp. 2d 67 (D.D.C. 2011),
aff'd, 720 F.3d 915 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540, 188 L. Ed. 2d 556 (2014) and cert. denied,
134 S. Ct. 1520, 188 L. Ed. 2d 451 (2014).
- 9 U.S.—*Ahjam v. Obama*, 37 F. Supp. 3d 273 (D.D.C. 2014), appeal dismissed, (D.C.Circ. 14-5116) (Jan.
16, 2015).
- 10 U.S.—*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
Tex.—*Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126 (Tex. 2010).
- 11 U.S.—*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
- 12 U.S.—*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
- 13 U.S.—*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
- 14 La.—*Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001).
- 15 R.I.—*Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95 (R.I. 1995).
- 16 U.S.—*Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977);
U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
Similar statement
The constitutional prohibition against bills of attainder was intended to safeguard against legislation
penalizing a particular person or group by taking away life, liberty, or property because the legislature judged
them guilty of conduct deserving punishment.
R.I.—*Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95 (R.I. 1995).
- 17 U.S.—*Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), judgment aff'd, 578 F.2d 1197 (7th Cir. 1978).
- 18 U.S.—*Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed.
2d 625 (1961).
- 19 U.S.—*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
- 20 U.S.—*Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

16A C.J.S. Constitutional Law § 697

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

D. Bills of Attainder

§ 697. Laws imposing civil disabilities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1096, 1097

Laws imposing civil disabilities as punishment for past acts, without trial, are bills of attainder.

A constitutionally prohibited "bill of attainder" comprehends a legislative decree of perpetual exclusion from a chosen vocation¹ or from some other government-conferred advantage.² In other words, laws imposing civil disabilities or forfeitures as a punishment for past acts, without judicial trial, are bills of attainder,³ but laws which do not proceed on the idea of punishment are not bills of attainder even if they impose such disabilities without judicial trial.⁴ Forbidden legislative punishment is not, however, involved merely because an act imposes burdensome consequences.⁵ Rather, the question is whether the act imposes punishment within the meaning of the prohibition against bills of attainder.⁶ Therefore, the initial inquiry in determining whether a statute is a bill of attainder is whether the disability imposed is punishment or merely regulation.⁷ The court will look beyond mere historical experience and will analyze whether the statute, viewed in terms of the type and severity of the burdens imposed, can reasonably be said to further nonpunitive legislative purposes,⁸ and where legitimate legislative purposes do not appear, it is reasonable to conclude that punishment was the purpose of the legislation.⁹

The manner in which a law is drafted is not dispositive on the issue of whether it is a bill of attainder and legislation fair on its face may fall within the proscriptions against such bills.¹⁰ However, only the clearest proof will suffice to establish the unconstitutionality of a statute on the ground that it constitutes a bill of attainder.¹¹ Furthermore, so long as people who engage in regulated conduct, be they many or few, can escape regulation merely by altering their present activities, there may be no complaint of attainder.¹²

Punishing past acts or preventing future acts or conduct.

Historical considerations do not compel restriction of the bill of attainder ban to instances of retribution,¹³ and punishment within the meaning of the proscription against bills of attainder is not limited solely to retribution for past events but may involve deprivations inflicted to deter future misconduct.¹⁴ Thus, legislation which inflicts a deprivation on a named or described person or group constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventative, discouraging future conduct.¹⁵

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Footnotes

- 1 U.S.—*ACORN v. U.S.*, 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010).
Okla.—*Yocum v. Greenbriar Nursing Home*, 2005 OK 27, 130 P.3d 213 (Okla. 2005).
- 2 Okla.—*Yocum v. Greenbriar Nursing Home*, 2005 OK 27, 130 P.3d 213 (Okla. 2005).
- 3 U.S.—*Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866); *U.S. v. Lovett*, 106 Ct. Cl. 856, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946).
R.I.—*Opinion to the House of Representatives*, 80 R.I. 281, 96 A.2d 623 (1953).
Past activity serving as a point of reference
U.S.—*Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984).
Job or office
The imposition on easily an identifiable individual or class of the sanction of mandatory forfeiture of a job or office is considered punishment under the Bill of Attainder Clause of the Federal Constitution.
U.S.—*Crain v. City of Mountain Home, Ark.*, 611 F.2d 726 (8th Cir. 1979).
"Punishment"
The word "punishment", in the sense of the federal constitutional provision that no state shall pass a bill of attainder, is more comprehensive than when used to describe imprisonment, fines, or deprivation of life; in the constitutional sense, it also includes penalties of a civil nature, by deprivation or suspension of civil or political rights, depending upon the attendant circumstances and causes of the deprivation.
Ark.—*Cooper v. Henslee*, 257 Ark. 963, 522 S.W.2d 391 (1975).
- 4 U.S.—*U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *Garner v. Board of Public Works of City of Los Angeles*, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951).
Mass.—*Faxon v. School Committee of Boston*, 331 Mass. 531, 120 N.E.2d 772, 44 A.L.R.2d 781 (1954).
Wis.—*Wisconsin Bingo Supply and Equipment Co., Inc. v. Wisconsin Bingo Control Bd.*, 88 Wis. 2d 293, 276 N.W.2d 716 (1979).
Shifting of economic burdens
R.I.—*Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95 (R.I. 1995).
- 5 U.S.—*Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).
Burdens which an individual or group dislikes
Wash.—*State v. Shultz*, 138 Wash. 2d 638, 980 P.2d 1265 (1999).
- 6 U.S.—*Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).
Burdens on citizens
The fact that burdens are placed on citizens by federal authority does not make those burdens punishment within the meaning of the proscription against bills of attainder.

- U.S.—*Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984).
- 7 Ind.—*Hamilton v. State ex rel. Van Natta*, 163 Ind. App. 342, 323 N.E.2d 659 (1975).
- Wis.—*Wisconsin Bingo Supply and Equipment Co., Inc. v. Wisconsin Bingo Control Bd.*, 88 Wis. 2d 293, 276 N.W.2d 716 (1979).
- 8 U.S.—*Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).
- Encouragement of draft registration**
- A statute denying federal financial aid to male students who failed to register for the draft did not impose punishment within the meaning of the proscription against bills of attainder by depriving nonregistrants of aid where the denial of a noncontractual government benefit did not fall within the historical meaning of forbidden legislative punishment and furthered nonpunitive legislative goals of encouraging nonregistrants to register for the draft.
- U.S.—*Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984).
- 9 U.S.—*Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).
- 10 Cal.—*Alpha Standard Investment Co. v. County of Los Angeles*, 118 Cal. App. 3d 185, 173 Cal. Rptr. 328 (2d Dist. 1981).
- 11 U.S.—*Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
- Ind.—*Hamilton v. State ex rel. Van Natta*, 163 Ind. App. 342, 323 N.E.2d 659 (1975).
- 12 U.S.—*Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961).
- 13 U.S.—*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
- 14 U.S.—*Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984).
- 15 U.S.—*Crain v. City of Mountain Home, Ark.*, 611 F.2d 726 (8th Cir. 1979).

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16A C.J.S. Constitutional Law § 698

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Constitutional Law

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PART II. Vested Rights and Retroactive Legislation

VII. Retroactive or Retrospective and Ex Post Facto Laws; Bills of Attainder

D. Bills of Attainder

§ 698. Bills of attainder; particular applications of general principles

[Topic Summary](#) | [References](#) | [Correlation Table](#)

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West's Key Number Digest, [Constitutional Law](#) 🔑 1100

The general rules relating to the prohibition against bills of attainder have been applied to various particular statutes concerning criminal matters or imposing civil disabilities.

The courts have adjudicated various particular statutes relating to criminal matters not to be bills of attainder, including sexual offender registration acts,¹ and statutes governing matters relating to parole or conditional release,² determinate sentencing,³ habitual criminals or offenders,⁴ and the death penalty.⁵ However, the courts have found other laws relating to criminal matters to be bills of attainder.⁶

Laws imposing or relating to civil disabilities.

The courts have determined various particular statutes imposing or relating to civil disabilities not to be bills of attainder, including a statute denying federal financial aid to male students who failed to register for the draft,⁷ a county's policy of excluding sex offenders and convicted felons from a weatherization assistance program,⁸ a statute eliminating the right of nonsettling parties involved in a credit union crisis to seek contribution from settling parties,⁹ statutes imposing standards

of qualifications for certain occupations,¹⁰ licensing requirements,¹¹ or financial requirements with respect to uninsured motorists.¹² Similarly, other particular statutes imposing civil disabilities have been adjudicated by the courts not to be bills of attainder, including statutes relating to the adjustment of status¹³ or the deportation¹⁴ of aliens, prohibiting strikes by public employees,¹⁵ or generally prohibiting the receipt, or possession, or specified transportation of firearms or ammunition by convicted felons,¹⁶ or persons who have been indicted for or have been convicted of a crime punishable by imprisonment for a term exceeding one year,¹⁷ or persons who have been dishonorably discharged from the armed forces.¹⁸

Conversely, various particular statutes have been found by the courts to be bills of attainder,¹⁹ including a local law reconstituting a county school board and providing for procedures to select the chairperson of the board, thereby cutting short the existing chairman's four-year term that had previously been established by statute and local board policy;²⁰ and a city ordinance and its implementing resolution limiting the city attorney's salary to \$1 per annum, thereby constructively barring him from assuming a position to which he was duly elected by the people of the city.²¹

CUMULATIVE SUPPLEMENT

Cases:

Provision of National Defense Authorization Act (NDAA), banning federal government's use of products from Russian-based cybersecurity company, reasonably furthered national security objective, as nonpunitive legislative purpose, weighing in favor of conclusion that provision did not violate Bill of Attainder clause; although many cyber companies operated in Russia, other gaps could exist in federal computer system's defenses, and less restrictive measures were possible, company's cybersecurity products could have compromised federal systems and caused significant harm, Russia demonstrated both means and willingness to launch cyber operations against United States government and its information systems, and Congress reasonably could have determined from evidence before it that company's Russian ties differed in degree and kind from those other companies, among other things. [U.S. Const. art. 1, § 9, cl. 3. Kaspersky Lab, Inc. v. United States Department of Homeland Security, 909 F.3d 446 \(D.C. Cir. 2018\).](#)

Congress's silence with regard to its motivation for prohibiting use of Russian cybersecurity company's products by federal government was insufficient to demonstrate that National Defense Authorization Act (NDAA) provision banning company's products constituted legislative punishment under motivational test for determining whether a statute violates the Bill of Attainder Clause, as claimed by company in challenging statute; Congressional silence could not overcome presumption that statutes are constitutional, and Congress was not actually silent, but rather, conducted months of inquiries into the risk of Russian cyber-attacks created by the government's use of company's products. [U.S. Const. art. 1, § 9, cl. 3. Kaspersky Lab, Inc. v. United States Department of Homeland Security, 311 F. Supp. 3d 187 \(D.D.C. 2018\).](#)

Voter-approved amendment to city's charter requiring organization of commission to draft new comprehensive zoning and development plan did not constitute unconstitutional bill of attainder, even though amendment prevented property owner from developing its land in manner previously approved by city ordinance, where owner made no allegation that its property was seized without compensation, eliminating owner's ability to build high-density housing on its land furthered legitimate nonpunitive interests in public safety and reducing traffic congestion, and there was no information as to voters' motives in approving amendment. [U.S. Const. art. 1, § 10. Center for Powell Crossing, LLC v. City of Powell, Ohio, 173 F. Supp. 3d 639 \(S.D. Ohio 2016\).](#)

Provision of John S. McCain National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA), prohibiting federal agencies from using, contracting with entity that used, or obligating or expending funds to procure specific covered telecommunications equipment made by Chinese company, did not serve as trial-like adjudication with retrospective focus, in

support of determining that provision furthered nonpunitive legislative purposes, rather than imposing punishment in violation of Bill of Attainder Clause, since provision did not reference any one single past incident, make explicit findings about specific past incident, limit scope of its application to past incident, or determine Chinese company's guilt. [U.S. Const. art. 1, § 9, cl. 3. Huawei Technologies USA, Inc. v. United States, 440 F. Supp. 3d 607 \(E.D. Tex. 2020\).](#)

City's condemnation ordinance and resolution condemning landowner's property as a nuisance was not an improper bill of attainder; condemnation ordinance did not legislatively punish a named individual or an easily ascertainable group, and resolution condemning the property was not a legislative act but an administrative one. [U.S. Const. art. 1, § 10. Convent Corporation v. City of North Little Rock, 2021 Ark. 7, 615 S.W.3d 706 \(2021\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 Ky.—[Hyatt v. Com., 72 S.W.3d 566 \(Ky. 2002\).](#)
Ohio—[Montgomery v. Leffler, 2008-Ohio-6397, 2008 WL 5147935 \(Ohio Ct. App. 6th Dist. Huron County 2008\).](#)
Minn.—[State v. Larson, 2006 WL 618857 \(Minn. Ct. App. 2006\).](#)
- 2 Fla.—[Mayes v. Moore, 827 So. 2d 967 \(Fla. 2002\).](#)
Pa.—[Com. ex rel. Rambeau v. Rundle, 455 Pa. 8, 314 A.2d 842 \(1973\).](#)
Act affecting jurisdiction of U.S. Parole Commission
U.S.—[Washington v. Reilly, 2009 WL 3400895 \(N.D. W. Va. 2009\).](#)
- 3 U.S.—[Guzman v. Morris, 644 F.2d 1295 \(9th Cir. 1981\).](#)
- 4 Colo.—[Velarde v. Zavaras, 960 P.2d 1162 \(Colo. 1998\).](#)
Wash.—[State v. Manussier, 129 Wash. 2d 652, 921 P.2d 473 \(1996\).](#)
"Three strikes" sentencing provision
A persistent offender accountability act, establishing a "three strikes" sentencing provision, was not an unconstitutional bill of attainder; the act did not specify the persons sought to be punished or identify them by past conduct, and a judicial sentencing hearing was necessary to determine the existence of two prior "strike" offenses.
Wash.—[State v. Thorne, 129 Wash. 2d 736, 921 P.2d 514 \(1996\).](#)
- 5 **Removal of hanging as means of execution**
Mont.—[Langford v. State, 287 Mont. 107, 951 P.2d 1357 \(1997\).](#)
Benefit of trial
The bill of attainder clause was not implicated with respect to a capital murder defendant's claim that the new death penalty statute, under which he was to be resentenced, constituted a bill of attainder, in that the legislation targeted an easily ascertainable group, i.e., those convicted of first-degree murder and subject to penalty of death, as the death penalty was not imposed upon the defendant without benefit of a trial.
Idaho—[State v. Lovelace, 140 Idaho 53, 90 P.3d 278 \(2003\), on reh'g on other grounds, 140 Idaho 73, 90 P.3d 298 \(2004\).](#)
- 6 U.S.—[Putty v. United States, 220 F.2d 473 \(9th Cir. 1955\).](#)
- 7 U.S.—[Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 \(1984\).](#)
- 8 U.S.—[Houston v. Williams, 547 F.3d 1357 \(11th Cir. 2008\).](#)
- 9 R.I.—[Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d 95 \(R.I. 1995\).](#)
- 10 U.S.—[Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 \(1951\); American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 \(1950\).](#)
Wash.—[Huntamer v. Coe, 40 Wash. 2d 767, 246 P.2d 489 \(1952\).](#)
Loyalty oath

A loyalty oath prescribed as a condition of employment is a general regulation providing standards of qualification and eligibility, and application thereof does not constitute punishment, and therefore, the statute is not a bill of attainder.

U.S.—*Ohlson v. Phillips*, 304 F. Supp. 1152 (D. Colo. 1969), judgment aff'd, 397 U.S. 317, 90 S. Ct. 1124, 25 L. Ed. 2d 337 (1970).

11 N.J.—*Matter of C. Schmidt & Sons, Inc.*, 79 N.J. 344, 399 A.2d 637 (1979).

Wis.—*Wisconsin Bingo Supply and Equipment Co., Inc. v. Wisconsin Bingo Control Bd.*, 88 Wis. 2d 293, 276 N.W.2d 716 (1979).

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Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367, §§ 49, 50.

12 U.S.—*Faron v. Tynan*, 320 F. Supp. 11 (D. Conn. 1970).

N.J.—*Williams v. Sills*, 55 N.J. 178, 260 A.2d 505 (1970).

13 U.S.—*Scheerer v. U.S. Atty. Gen.*, 513 F.3d 1244 (11th Cir. 2008).

14 U.S.—*Rubio de Cachú v. Immigration and Naturalization Service*, 568 F.2d 625 (9th Cir. 1977).

15 N.Y.—*Di Maggio v. Brown*, 19 N.Y.2d 283, 279 N.Y.S.2d 161, 225 N.E.2d 871 (1967).

16 U.S.—*U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974).

Idaho—*Zivkovic v. State*, 150 Idaho 783, 251 P.3d 611 (Ct. App. 2011).

N.C.—*State v. Whitaker*, 364 N.C. 404, 700 S.E.2d 215, 63 A.L.R.6th 755 (2010).

17 Me.—*State v. Myrick*, 436 A.2d 379 (Me. 1981).

18 U.S.—*U.S. v. Karnes*, 437 F.2d 284 (9th Cir. 1971).

19 U.S.—*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

Ark.—*Cooper v. Henslee*, 257 Ark. 963, 522 S.W.2d 391 (1975).

20 Ga.—*Cook v. Smith*, 288 Ga. 409, 705 S.E.2d 847, 264 Ed. Law Rep. 897 (2010).

21 U.S.—*Crain v. City of Mountain Home, Ark.*, 611 F.2d 726 (8th Cir. 1979).

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